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Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 349

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM AND JOE R. SOUTHARD, JR., PETITIONERS,

vs.

MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 20, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Tenth Circuit	a	1
Caption (omitted in printing)	a	
Appellants' statement of points relied on	1	1
Stipulation designating parts of the record to be printed	2	2
Record from D. C. U. S., Northern District of Oklahoma	5	4
Bill of complaint	5	5
Answer and cross-petition of Mrs. Ethel Riddler et al	11	10
Exhibits (Probate Case No. 4354, County Court, Creek County, Oklahoma):		
"A"—Petition for letters of administration	22	21
"B"—Order appointing administrator	24	23
"C"—Administrator's bond	25	24
"D"—Letters of administration	26	25
"E"—General inventory and appraisement	26	25
"F"—Report of administrator (omitted per stipulation)	32	
"G"—Stipulation of settlement	39	29

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 22, 1940.

	Original	Print
Record from D. C. U. S., Northern District of Oklahoma—Continued		
Answer and cross-petition of Mrs. Ethel Riddler et al.—Continued.		
Exhibits (Probate Case No. 4354, County Court, Creek County, Oklahoma)—Continued:		
"H"—Amended petition for approval of final account	43	32
"I"—Order approving administrator's final account, etc.	46	35
Motion of plaintiff for order of service	52	41
Order for service on defendants outside of district and return of service	53	42
Special appearance and plea to jurisdiction of E. A. Kelleam	54	43
Special appearance and motion to dismiss of Joe E. Kelleam	54	43
Special appearance and motion to dismiss of J. R. Southard, Jr.	55	44
Special appearance and motion to dismiss of Nell Southard	55	44
Amendment to bill of complaint	55	45
Order overruling special appearances and motions to dismiss, etc.	60	49
Motion of E. A. Kelleam et al. to strike cross-petition	61	50
Answer of E. A. Kelleam to bill of complaint	61	50
Answer of Joe E. Kelleam to bill of complaint	65	54
Answer of J. R. Southard, Jr., to bill of complaint	66	55
Answer of Nell Southard to bill of complaint	66	55
Inventory of receiver	66	56
Order overruling motions to strike cross-petition	67	57
Answer of E. A. Kelleam et al. to cross-petition	68	57
Amendment to answer of defendant Southard and plea in abatement	70	60
Defendants' requested special findings of fact and conclusions of law	72	61
Findings of fact and conclusions of law	77	67
Decree	88	78
Notice of appeal	92	83
Appeal bond (by reference only)	93	83
Order extending time for docketing cause	93	83
Summary of the record, evidence, and proceedings at trial:		
Statement relative to proceedings	93	83
Complainant's witnesses:		
Lee Snider	96	86
Lee Snider (recalled by cross-petitioners)	122	112
P. A. Sellers	103	93
Luster Cook	104	94
J. C. Thomas	104	95
Streeter Speakman	109	100
J. M. Scott	117	107

	Original	Print
Record from D. C. U. S., Northern District of Oklahoma—Continued		
Statement relative to proceedings—Continued		
Complainant's witnesses—Continued:		
Mrs. Ethel Riddler	118	108
Francis Kelleam	120	110
Jim Kelleam	121	111
Exhibits:		
—Notice to creditors (statement)	97	87
—Notice of settlement of final account, etc.	97	88
—Notice of hearing of final account, etc.	98	88
—Deed from Home Building and Loan Association to L. B. Kelleam (statement)	99	89
—Quitclaim deed from E. T. Finley to L. D. Kelleam (statement)	99	89
—Warranty deed from Nell K. Southard et al. to Maude Grady (statement)	99	89
—Warranty deed from E. A. Kelleam to Ophelia E. Kelleam	99	90
—Order of final discharge, etc.	100	91
—Journal entry of judgment	102	92
—Letter, January 13, 1938, from Speakman & Speakman to Dr. E. A. Kelleam	111	101
—Letter, January 17, 1938, from E. A. Kelleam, M. D., to Streeter Speakman	113	103
—Warranty deed from Tulsa Building and Loan Association to Leggette D. Kelleam (statement)	122	112
—General warranty deed from Tulsa Building and Loan Association to Leggette D. Kelleam (statement)	122	112
1—Petition to reopen case No. 4354, County Court, Creek County, Oklahoma	123	113
2—Amended petition, case No. 4354, County Court, Creek County, Oklahoma	125	115
Acknowledgment of service of summary of record etc.	128	118
Portion of plaintiffs' exhibit "C"—Petition for approval of final account, etc., case No. 4354, County Court, Creek County, Oklahoma	128	118
Portions of Plaintiffs' Exhibit "D":		
Amended and supplemental final account, case No. 4354, County Court, Creek County, Oklahoma	132	122
Demurrer, case No. 4354, County Court, Creek County Oklahoma	141	129
Appellants' statement of points relied on (by reference only)	142	131
Appellants' designation of record on appeal	143	131
Appellants' amendment to designation of record on appeal	144	133
Designation of Maryland Casualty Company of record on appeal	145	133

	Original	Print
Record from D. C. U. S., Northern District of Oklahoma—Continued		
Amendment of Maryland Casualty Company to designation of record on appeal	146	134
Clerk's certificate (omitted in printing)	147	
Order of submission	149	136
Opinion, Huxman, J.	149	136
Judgment	158	145
Petition for rehearing (omitted per stipulation)	165	
Order denying petition for rehearing	179	146
Motion for stay of mandate	179	146
Order granting motion for stay of mandate	180	147
Clerk's certificate (omitted in printing)	180	
Order allowing certiorari	182	147
Stipulation relative to printing of record	183	148

[fol. A] [Caption omitted]

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 2059

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM and J. R. SOUTHARD, JR., Appellants,

vs.

MARYLAND CASUALTY COMPANY OF BALTIMORE, MD., a corp., Mrs. Ethel Riddler, Mrs. Dorothy Payne, J. K. Perkins, Mrs. F. Bates, Glen Perkins, Bessie Mathews, Mrs. Elouise Kulp, Leggette Hall, Lamar Hall, Marguerite Bradley Kelleam, Mary Kate Hall, Kelleam Hall, Clifford Kelleam, Kathleen Kelleam, Dr. Fannin Kelleam, Francis Kelleam, Mrs. Jimmie Kelleam, and Robert Kelleam, Appellees

APPELLANTS STATEMENT OF POINTS UPON WHICH THEY INTEND TO RELY ON APPEAL—Filed January 27, 1940

Appellants E. A. Kelleam, Nell Southard, Joe E. Kelleam and J. R. Southard, Jr., comformable to Rule 13 of this Honorable Court, for their statement of points upon which they intend to rely on appeal, respectfully state:

1. That the U. S. District Court for the Northern District erred in overruling and denying pleas of the appellants to venue and to the jurisdiction of the court.

2. That said court erred in overruling and denying appellants' demurrer and motion to dismiss at the conclusion of the evidence for that the evidence fails to establish:

First: Venue and jurisdiction in the court.

Second: Fraud.

Third: Facts warranting vacation of the decree of the County Court of Creek County, establishing heirship, which was res judicata.

[fol. 2] 3. That said court erred in refusing to make findings of fact and conclusions of law as requested by appellants at the trial.

4. That the court erred in making findings of fact and conclusions of law as requested by appellees in that the same are contrary to the law and contrary to the evidence.

5. That the court erred in entering its decree for appellees and refusing to enter decree for appellants to dismiss, and for costs and in refusing to grant a new trial and rehearing.

Glenn O. Young, Attorney for Appellants.

ACKNOWLEDGEMENT OF SERVICE

Service of a copy of the foregoing is acknowledged this the 11 day of January, 1940.

W. E. Green, J. C. Farmer, Attorneys for Maryland Casualty Co. of Baltimore, Md., a corp. appellee.
Heber Finch, Attorney for cross-petitioners Mrs. Ethel Riddler, et al., appellees.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

STIPULATION DESIGNATING RECORD FOR PRINTING ON APPEAL—Filed January 27, 1940

Come now appellants and appellees herein and by their respective counsel of record stipulate and agree and jointly designate for printing, comformable to the rules of this court, the following:

1. Bill of Complaint, filed June 8, 1938.

2. Separate Answer and Cross-Petition of Mrs. Ethel Riddler, et al., filed June 18, 1938, with exhibits.

3. Motion of Plaintiff for Order of Service on Defendant E. A. Kelleam, and Joe E. Kelleam Outside of District and Order for Service Outside of District, and return of service thereon, filed Aug. 27, 1938.

4. Special Appearance and Plea to the Jurisdiction of E. A. Kelleam, and Special Appearance and Motion to Dis-
[fol. 3] miss of Joe E. Kelleam, J. R. Southard, Jr., and Nell Southard, filed Sept. 3, 1938.

5. Amendment to Bill of Complaint, filed Oct. 24, 1938.

6. Amendment to Answer and Plea in Abatement, filed Jan. 21, 1939.

7. Journal Entry overruling Special Appearance and Motion to Dismiss of Joe E. Kelleam, J. R. Southard, Jr. and Nell Southard, and Special Appearance and Plea to the Jurisdiction of E. A. Kelleam, filed Jan. 23, 1939.

8. Motion of E. A. Kelleam, Nell Southard, J. R. Southard, Jr. and Joe Kelleam to Strike Cross-Petition, filed Jan. 25, 1939.

9. Separate Answer of defendant E. A. Kelleam to Bill of Complaint and Amendment thereto, filed Jan. 25, 1939.

10. Separate Answer of the Defendant J. R. Southard, Jr., filed Jan. 25, 1939.

11. Separate Answer of the Defendant Nell Southard, filed Jan. 25, 1939.

12. Separate Answer of the Defendant Joe E. Kelleam, filed Jan. 25, 1939.

13. Inventory of Receiver, filed May 4, 1939.

14. Separate Answer of defendants E. A. Kelleam, Mrs. Nell Southard, J. R. Southard, Jr. and Joe E. Kelleam to Cross-Petition, filed June 7, 1939.

15. Journal Entry Overruling Motion to Strike Cross-Petition, filed June 12, 1939.

16. Defendants' Request for Special Findings of Fact and Conclusions of law, filed June 21, 1939.

17. Findings of Fact and Conclusions of Law, filed Sept. 26, 1939.

18. Decree, filed Sept. 26, 1939.

19. Notice of Appeal, filed Nov. 25, 1939.

20. Recitation that appellants filed Appeal Bond Nov. 29, 1939.

21. Order Extending Time to Docket Appeal, filed Dec. 27, 1939.

[fol. 4] 22. Summary of the Record, Evidence and Proceedings at the Trial, prepared and filed by appellants Dec. 28, 1939, to which add

A. Petition for Approval of Final Account, filed in the County Court of Creek County in cause No. 4354, and introduced in evidence.

B. Amended and Supplement Final Account in said cause No. 4354.

C. Demurrer filed in cause No. 4354.

23. Appellants' Statement of Points:

A. Filed in the U. S. District Court.

B. Filed in the U. S. Circuit Court of Appeals.

24. Appellants' Designation of Record on Appeal and amendment thereto.

25. Appellees' Designation of Record on Appeal and amendment thereto.

26. This Designation and Stipulation.

27. Clerk's Certificate.

It is further stipulated and agreed that this joint stipulation may be taken and accepted in lieu of any designation heretofore presented and filed by either party.

Glenn O. Young, Attorney for Appellants. W. E. Green, J. C. Farmer, Robert J. Woolsey, Heber Finch and R. A. Young, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 5] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 1290—Equity

MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, a Corp., Plaintiff,

vs.

E. A. KELLEAM, NELL SOUTHARD, J. R. SOUTHARD, JR., JOE E. KELLEAM, J. K. Perkins, Mrs. Fannie Bates, Mrs. Bessie Bates, Mrs. Elloise Bates, Glen Perkins, Mrs. Ethel Riddler, Mrs. Dorothy Payne, Clifford Kelleam, Mrs. Kathlyn Kelleam, Daughter of W. S. Kelleam, Dec.

(whose name is not known), Leggette Hall, Marguerite Bradley, Lamar Hall, Mary Kate Hall, a daughter of Mrs. Kate Hall, Dec. (whose married name is unknown), Kelleam Hall, Mrs. Clyde Bates, Dr. Fannin Kelleam, Francis Kelleam, Mrs. Jimmie Kelleam, daughter of Dr. R. T. Kelleam, Dec., (now married and name unknown) and Robert Kelleam, Defendants

---

BILL OF COMPLAINT—Filed June 8, 1938

Now comes the plaintiff, and for its cause of action and complaint against the defendants and each of them, says:

I

That the plaintiff herein is a corporation, duly organized and existing under and by virtue of the laws of the State of Maryand, with its principal place of business at Baltimore, and duly domesticated and authorized to do business under and by virtue of the laws of the State of Oklahoma, and that among the authorized powers and rights of said corporation is that of becoming surety on bonds.

[fol. 6] That E. A. Kelleam is, as this petitioner is informed and believes at the present time a resident of Sells, Arizona. That Nell Southard and J. R. Southard, Jr., are residents of the State of Oklahoma. That Joe Kelleam is a resident of the State of Arizona. That all of the other defendants are residents and citizens of the State of Arkansas and the State of Oklahoma, the exact addresses of each this plaintiff does not know and cannot give, but is informed and believes that a part of said defendants lives in the State of Oklahoma, and within the Northern District of Oklahoma, and may be served with process out of this court.

II

That in the early part of 1936 Leggette D. Kelleam then a resident and citizen of Creek County, Oklahoma, died. And, shortly thereafter, the defendant A. E. Kelleam was by the County Court of Creek County, Oklahoma, duly appointed as Administrator of his estate, and as a condition precedent to his qualification, as such administrator, was required to give an administrator's bond in the sum of Ten Thousand ($10,000.00) Dollars. And that this plaintiff became surety

on said bond, and said bond was duly filed in the Probate case of Creek County, Oklahoma, approved and the said A. E. Kelleam took the oath of office and fully qualified and took charge of all the assets and property of the deceased, Leggette D. Kelleam, consisting of both real and personal property—the exact description and nature of which this plaintiff does not know, but that it consisted of personal and real property appraised and valued at approximately Thirty Thousand ($30,000.00) Dollars; But that among the items of property which said Administrator took charge of was,

1. Lot 18 Block 5 Broadway Addition to Drumright, Creek County, Oklahoma

2. Lot 11 Block 1 Drumright Addition to Drumright, Creek County, Oklahoma

3. Lot 7 Block 2 Belle Vern Addition to Oklahoma City, Oklahoma County, Oklahoma

4. Lot 8 Block 2 Belle Vern Addition to Oklahoma City, Oklahoma County, Oklahoma

5. Lots 29 and 30 Block 7, College Hill Addition to Oklahoma City, Oklahoma County, Oklahoma.

[fol. 7] 6. 7/16ths interest Sam Vance lease, SE¼ SW¼ Sec. 6, Twp 18 N, Range 7 E, Creek County, Oklahoma.

7. 1/32nd overriding royalty interest Sam Vance lease, SW¼ SW¼ Sec. 6-18-7E, Creek County, Okla.,

8. 1 note signed by Nell Southard, Blanchard, Okla., for $700.00.

9. 1 note signed by J. R. and Nell Southard for $4000.00.

10. 1 note signed by J. R. and Nell Southard for $1000.00.

11. 1 note signed by J. R. and Nell Southard for $700.00.

12. Cash in bank approximately $3500.00.

That the value of the property above set forth is far in excess of $3000.00 and the controversy herein involves more than $3000.00, and is far in excess of the jurisdictional amount qualifying this Court with jurisdiction. That there is a diversity of citizenship—that this action is between residents and citizens of separate and different states, and

that some of the defendants in this action are residents of Oklahoma, and as this plaintiff is informed and believes, are within the Northern District of Oklahoma and may be served with process out of this Honorable Court. That a part of the property is located within the Northern District and that this Honorable Court has jurisdiction of the subject matter and of the parties to this action.

III

That after A. E. Kelleam was appointed and qualified as Administrator of the estate of Leggette D. Kelleam, upon his petition and that of the defendant Nell Southard, he took charge of the property of the deceased, administered it and then sometime in August or September 1937, the exact date of which this plaintiff does not have at this time, but same is shown by the records of the County Court of Creek County, Okla., the said A. E. Kelleam filed his denominated final account and amended final account, and same was heard by the County Court of Creek County, Oklahoma, and the County Court of Creek County, Oklahoma, made an Order approving the final account and determining heirship and decreeing distribution of the property remaining in the hands of the Administrator. That a decree entered by the County Court gave all of this remaining property and decreed that it pass to A. E. Kelleam and Mrs. Nell Southard.

[fol. 8] That thereafter, and within a few weeks of the rendition of this decree and order by the County Court, certain claimed heirs, to-wit: Mrs. Ethel Riddler, Dorothy Payne and others filed their application in the County Court of Creek County, to set aside and vacate the Order and decree of the County Court decreeing that A. E. Kelleam and Mrs. Nell Southard were the sole and only heirs of the deceased Leggette D. Kelleam and to declare and decree them to be heirs and to receive their distributive share of their estate, alleging in their application for vacating this decree that same had been procured by fraud perpetrated on the County Court by A. E. Kelleam and Mrs. Nell Southard. Said additional heirs alleging that they were children of half brothers and sisters of the deceased, and that A. E. Kelleam and Mrs. Nell Southard were full brothers and sisters of the deceased, and that they all inherited equally and alike, the estate of Leggette D. Kelleam being a general estate and not an ancestral estate. That

this application and petition on the part of these moving heirs is still pending in the County Court of Creek County, Oklahoma, and that all of the other heirs have now intervened therein, and this plaintiff alleges upon information and belief that the defendants hereinabove named are all of the heirs and claimed heirs of the deceased, Leggette D. Kelleam.

IV

That after the decree of the County Court, which is now sought to be vacated, was rendered and within a short time thereafter, the defendant A. E. Kelleam undertook to and did make a conveyance to his son Joe Kelleam and that the defendant Mrs. Nell Southard attempted to and did make a conveyance of the real property which she had purportedly received in this decree of distribution, to her son J. R. Southard, Jr., and that these conveyances were not made until after the alleged heirs had moved to vacate the final decree and order of distribution, and this plaintiff believes and alleges the fact to be that the conveyances were made without consideration and with full knowledge of the claimants of the other defendants in this action, and that they are void.

V

This plaintiff further alleges that it is informed and believes and asserts it as a fact that A. E. Kelleam and Mrs. Nell Southard, if the property involved herein and property received by them under said decree is not preserved [fol. 9] and held intact, cannot be made to respond or satisfy a judgment rendered against them or either of them for the distributive share of these claimed heirs in the estate of their deceased brother, and that unless this property involved in this action is impounded and held intact to await the final outcome of the litigation between these defendants and to respond to satisfy a judgment or any judgment that might be rendered in favor of the contesting heirs as against A. E. Kelleam and Mrs. Nell Southard, that then and in that event said property will be dissipated and will not be available to satisfy such judgment or order, and will not be available to be distributed to the claimed heirs, if it should be adjudged they were heirs and that the said A. E. Kelleam and Mrs. Nell Southard are not and will not be financially able to respond and pay or satisfy any judgment or order made against them in favor of their half

brothers and sisters or the children of their half brothers and sisters and them and in that event said claimed heirs will fall back on and require the plaintiff herein to pay, as surety on the bond of A. E. Kelleam, the distribute shares that may be awarded to the contesting heirs herein. And that this plaintiff is entitled to have the property in the hands of A. E. Kelleam and/or Mrs. Nell Southard impounded and held intact and preserved to await and abide the final order or judgment that may be rendered in the controversy between A. E. Kelleam and Mrs. Nell Southard upon the one hand and the other defendants in this action upon the other hand.

This plaintiff further says that a part of this property is rental property and that the rents, issues and profits from said property, in addition to the corpus of said property should be saved and preserved, and that a part of the property involved herein is oil property that should be conserved and preserved and that it is necessary to operate said property and pay for the operation of said property and at the present time, under this controversy nobody is paying for the operation of said property and same is being neglected and should be conserved and protected by being properly operated.

That this plaintiff is without and has no adequate remedy at law, and that there will be an irreparable injury done to this plaintiff unless the property involved in this action is impounded, conserved, preserved and held to await the outcome of the controversies between the defendant in this [fol. 10] action so as to protect and exonerate this surety on the bond of A. E. Kelleam by having the property present to await final judgment, and to be present for the distribution in whatever manner it is finally held said property should be distributed, and to hold this plaintiff harmless as against any claim under its bond by reason of the failure of said property to be present for satisfaction of final judgment or order which may be rendered in this cause.

That the property involved in this action be impressed with an equitable lien by this Honorable Court to satisfy and discharge final judgment rendered between the litigation defendants herein, and said lien to be decreed against said property to satisfy the claim of any of the defendants herein.

Wherefore, this plaintiff prays that a Receiver be appointed in this action to take charge of the property belonging to said estate and to conserve and preserve same to await the final action and outcome of the controversy and litigation between A. E. Kelleam and Mrs. Nell Southard upon the one hand and the other contesting heirs, being the other defendants in this action upon the other hand, and to impress a lien upon said property to satisfy any claim of the adverse defendants in this action to A. E. Kelleam and Mrs. Nell Southard; and, to impound and hold this property in the hands of the Receiver appointed at the instance and under the direction of this Honorable Court, and to hold and keep said property, and to collect the rents, issues and profits therefrom, until the further order of this Court and until the controversy be finally settled between the defendants herein, and to continue said property impressed with a lien to satisfy final judgment that may be rendered between the defendants herein; and then and in that event such Receiver be directed to deliver and turn said property over to whoever it is finally determined should receive the property and to exonerate and hold this plaintiff harmless and free from any liability in and by virtue of its suretyship on the administrator's bond of A. E. Kelleam, and to issue a citation to each of the parties herein, requiring them to come in and set up whatever claims they have to the property involved herein, and to bind all of said defendants by the decree and order of this Honorable Court, appointing a Receiver, impounding said property and exonerating this plaintiff, and for such other and further orders and decrees [fol. 11] as this Honorable Court may in equity and good conscience deem this plaintiff entitled.

(Signed) Green & Farmer, Attorneys for Plaintiff.

(Jurat omitted per stipulation.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER AND CROSS PETITION OF MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE AND OTHERS SIMILARLY SITUATED—Filed June 18, 1938

Now come the defendants, Mrs. Ethel Riddler, Mrs. Dorothy Payne, J. K. Perkins, Mrs. F. Bates, Glen Perkins,

Bessie Mathews, Mrs. Elouise Kulp, Leggette Hall, Lamar Hall, Marguertte Bradley Kelleam, Mary Kate Hall, Kelleam Hall, Clifford Kelleam, Kathleen Kelleam, Dr. Fannin Kelleam, Francis Kelleam, Mrs. Jimmie Kelleam, and Robert Kelleam, and for their answer or response to the bill of complaint of the plaintiff herein filed, say:

I. These answering defendants admit the allegations in Paragraph No. 1 of the plaintiff's bill of complaint, except that same should be corrected in the following particulars: J. K. Perkins resides in Milwaukee, Wisconsin; Mrs. Fannie [fol. 12] Bates, the daughter of Mary Perkins, resides in Yorba Linda, California; Mrs. Bessie Mathews resides in Santa Anna, California; Mrs. Elouise Kulp resides in Long Beach, California; Glen Perkins resides in Yorba Linda, California; Mrs. Ethel Riddler and Mrs. Dorothy Payne reside in Fort Smith, Arkansas; Clifford Kelleam's address is not known to the pleader at this time; Kathleen Kelleam resides in Los Angeles, California, at 7501 S. Central Avenue; Leggette Hall resides at Little Rock, Arkansas; Lamar Hall resides at Waldrum, Arkansas; Marguerite Bradley Kelleam resides at Long Beach, California; Dr. Fannin Kelleam resides at Amarillo, Texas; Francis Kelleam resides at Oklahoma City, Oklahoma; Mrs. Jimmie Kelleam resides at Oklahoma City, Oklahoma, and Robert Kelleam resides in the State of Texas, the exact address of which the pleased does not have at this time.

II. These answering defendants further admit the allegations set forth in plaintiff's bill of complaint in Paragraph No. II, further alleging that there was much personal property belonging to the deceased, Leggette D. Kelleam, which is not listed therein and as more particularly shown and itemized by an inventory and appraisement filed in the probate cause in the County Court of Creek County, Oklahoma, and that all of said personal property was located in Creek County, State of Oklahoma, and there taken possession of by the defendant E. A. Kelleam and the defendant, Francis Kelleam admits that she was within the Northern District of Oklahoma and there served with process in this cause personally.

III. These answering defendants further admit the allegations set forth in plaintiff's bill of complaint in Paragraph No. III, with the explanation that they do not admit

the validity of the orders made by the County Court of Creek County, Oklahoma, but do admit that the County Court of Creek County, Oklahoma, entered the purported orders pleaded in this paragraph and that said orders were procured from the County Court by the defendants, E. A. Kelleam and Nell Southard, by and through fraudulent representations to the County Court of Creek County, Oklahoma, and that the orders purported to have been made are void upon their face, in addition to having been fraudulently procured, a copy of which order will be attached to this pleading and made a part of the cross petition herein.

IV. These answering defendants further say, as to Para- [fol. 13] graph No. IV, of plaintiff's bill of complaint, that they now have been informed that there was an attempted conveyance by E. A. Kelleam to his son, Joe Kelleam and by the defendant Nell Southard to her son J. R. Southard, Jr., but as to this being a fact, these answering defendants are not fully advised, but if such a conveyance was attempted, and was, in truth and fact made, it was and is a void conveyance, and should be cancelled, set aside and held for naught, for that it was taken with full knowledge of the claims, rights, equity, interest and title of these answering defendants in and to said property, and that whatever interest was conveyed, if any, is inferior to and subject to the equities, interest, right and title of these answering defendants, and that whatever cloud such conveyance may cast upon said property as against these answering defendants, should by this Honorable Court be vacated, cleared and set aside.

V. As to Paragraph No. V of plaintiff's bill of complaint, these answering defendants are informed, and upon information and belief, represent to this Honorable Court that unless the property involved in this action is impounded preserved and held and impressed with a lien, it will be dissipated, if not destroyed, and that the rents, issues and profits thereof will be lost, and that the oil property will be greatly depreciated, if not lost, and that E. A. Kelleam and Nell Southard, outside of this property, are not financially able to respond to and satisfy the claims of these answering defendants and that in addition thereto, by reason of the apparent record, it may be possible to place this property beyond the reach of these defendants and permit the intervention of innocent purchasers or encumbrancers without

the knowledge of the interest, title, equity and claim of these answering defendants unless, these answering defendants say, this Honorable Court in its equity powers decrees for the purpose of the record and to advise the world of the interest, equity, right and title of these answering defendants in and to said property of their claim, equity and lien, so as to prevent the intervening rights of any encumbrancer or purchaser from transgressing the rights of these answering defendants.

And these answering defendants further admit that the plaintiff herein has no adequate remedy at law and is entitled to the equity relief sought in this bill of complaint and is entitled to the appointment of a Receiver to take charge of said property and impound it, keep it, preserve and collect [fol. 14] the rents, issues and profits therefrom, as prayed for in the bill of complaint.

Wherefore, having fully answered, these defendants pray that this Honorable Court take jurisdiction of this matter and to impress the lien in favor of these defendants on the property involved in this action and to appoint a Receiver to hold, protect, conserve and keep said property, so that it may be distributed in the respective shares they are entitled to these answering defendants, as set forth in their cross petition which follows hereafter.

Heber Finch, Fred S. Armstrong and Pliney Fry,
Attorneys for the Defendants.

Cross Petition

Now come the same defendants who have answered hereinabove and for their cross petition against the defendants, E. A. Kelleam, Mrs. Nell Southard, J. R. Southard, Jr., and Joe E. Kelleam, say:

I. That the defendant E. A. Kelleam was a full brother of Leggette D. Kelleam, deceased; and Nell Southard was a full sister of Leggette D. Kelleam, deceased, and that J. R. Southard, Jr., is the son of Nell Southard and that Joe E. Kelleam is the son of E. A. Kelleam, and that the defendants herein, J. K. Perkins, Mrs. Fannie Bates, Mrs. Bessie Mathews, Mrs. Elouise Kulp and Glen Perkins are the children of and the sole surviving heirs of Mary Perkins nee

Kelleam, deceased, who died prior to the date of the death of Leggette D. Kelleam, and that said deceased, Mary Perkins, nee Kelleam, was a half sister of Leggette D. Kelleam, having a common father.

That the defendants herein, Mrs. Ethel Riddler and Mrs. Dorothy Payne, are the children and sole surviving heirs of J. M. Kelleam, deceased, who died in 1903, and that J. M. Kelleam was a half brother of the deceased, Leggette D. Kelleam.

That the defendants herein, Clifford Kelleam and Kathleen Kelleam, are the children and the sole surviving heirs of W. S. Kelleam, deceased, who was a half brother of Leggette D. Kelleam and that said W. S. Kelleam died in 1908.

That the defendants herein, Leggette Hall, Marguerite [fol. 15] Bradley (the same as Marguerite Bradley Kelleam), Lamar Hall, Mary Kate Hall (the same as M. K. Hall) and Kelleam Hall are the children and sole surviving heirs of Mrs. Kate Hall, nee Kelleam, deceased, who died in 1918 and who was a half sister of the deceased, Leggette D. Kelleam.

That the defendants herein, Dr. Fannin Kelleam, Francis Kelleam, Mrs. Jimmie Kelleam and Robert Kelleam are the children and sole surviving heirs of Dr. R. T. Kelleam, deceased, who was a half brother of Leggette D. Kelleam, and who died long prior to the death of Leggette D. Kelleam.

That Mrs. Fannie Bates and Mrs. Klyde Bates are the half sisters of the deceased, Leggette D. Kelleam, and that the said Mrs. Fannie Bates still lives, but that these answering defendants are informed and believe that since the death of Leggette D. Kelleam, Mrs. Klyde Bates has departed this life, but left surviving her Francis Richardson, James Russell Bates and Robert Bates, her children and Joe Bates, her surviving husband, who are her sole and only surviving heirs.

II. That Leggette D. Kelleam died a resident of Creek County, Oklahoma, on or about August 8, 1936, unmarried.

That between the date of his death on August 8, 1936, and August 25, 1936, the defendant, E. A. Kelleam, joined by the defendant, Nell Southard, petitioned the county Court of Creek County, Oklahoma, for the appointment of E. A. Kelleam as Administrator of the estate of Leggette D. Kelleam, deceased, and that in said petition said defendants repre-

sented to the County Court of Creek County, Oklahoma, that they were the sole and only surviving heirs of Leggette D. Kelleam, deceased, and that no notice of the hearing on said petition was necessary, because there were no other heirs. That this petition was filed with the Court Clerk of Creek County, Oklahoma, styled "In the Matter of the Estate of Leggette D. Kelleam, Deceased" and was assigned "Probate Cause No. 4354", a copy of said petition is attached hereto marked, for the purpose of identification, as these defendants' Exhibit "A" and made a part hereof, as fully as if copied at length herein. That on this petition a hearing was had and an order was made by the County Court directing the appointment of E. A. Kelleam as Administrator of the estate of Leggette D. Kelleam, deceased, a copy of said order is attached hereto marked, for the purpose of identification, as these defendants' Exhibit "B" and made a part [fol. 16] hereof, as fully as if copied at length herein. That under this order, E. A. Kelleam qualified as such Administrator by filing a bond and by taking the oath and upon which letters of administration were issued, a copy of the bond is attached hereto marked, for the purpose of identification, as these defendants' Exhibit "C" and made a part hereof, the same as if copied at length herein, and that a copy of the letters of administration are attached hereto marked, for the purpose of identification, as defendants' Exhibit "D" and made a part of this cross petition, the same as if copied at length herein. That immediately thereupon the said E. A. Kelleam took possession of all of the estate of Leggette D. Kelleam, deceased, and filed in this said cause an inventory and appraisement setting out in detail what estate he did receive and take unto his possession as such administrator, a copy of which said inventory and appraisement is attached to this cross petition marked, for the purpose of identification, as defendants' Exhibit "E" and made a part hereof, the same as if set out at length herein.

That sometime prior to the 18th day of May, 1937, the defendant, E. A. Kelleam, filed in the County Court of Creek County, Oklahoma, in the case numbered and styled herein concerning the estate of Leggette D. Kelleam, his said denominated administrator's final account and obtained the County Court to set a hearing for approval of same and for the determination of heirship and a decree of distribution on the 18th day of May, 1937. That a copy of said denominated final report of said Administrator is attached hereto marked,

for the purpose of identification, as defendants' Exhibit "F" and made a part of this cross petition, the same as if set out at length herein.

That sometime prior to May 18th, 1937, the date for the hearing on the final account as hereinabove stated, but the exact date of which is unknown to these defendants, the defendant Mrs. Fannie Bates, nee Kelleam and the heirs of Mrs. Klyde Bates, two of the half sisters of the deceased, evidently found out about the death of their brother, Leggette D. Kelleam and of the fact that the defendant E. K. Kelleam was administering on his estate and was about to obtain the County Court to distribute said estate in its entirety to E. A. Kelleam and Nell Southard, and that they immediately contacted the defendant E. A. Kelleam and the Defendant Nell Southard and on the 12th day of May, 1937, the defendant, E. A. Kelleam and Nell Southard, as denomi-
[fol. 17] nated first parties entered into a contract with Mrs. Fannie Bates, nee Kelleam, Francis Richardson, James Russell Bates, Robert Bates and Joe Bates, evidently the heirs of Mrs. Klyde Bates, upon the other hand denominated as second parties, concerning their interest or distributive share in their brother's estate, a copy of which contract and agreement is attached hereto marked, for the purpose of identification, as these defendants' Exhibit "G" and made a part of this cross petition, as fully as if copied at length herein.

That pursuant to the contract just immediately above referred to, the defendant, E. A. Kelleam and, as these defendants are informed, believe and allege it to be a fact, assisted by the defendant, Nell Southard, prepared and filed some kind of an amendment to or an amended final account and petition for determination of heirship and distribution of property, a copy of which is attached hereto marked, for the purpose of identification, as these defendants' Exhibit "H", and made a part of this cross petition, the same as if copied at length herein. And, on the 18th day of May, 1937, the County Court of Creek County, Oklahoma, took up and heard the final account and made a purported and pretended order covering same; denominated as "Order Approving Administrator's Final Account, Determining Heirship and Providing for Distribution of Estate," a copy of which said order of the County Court is attached hereto marked, for the purpose of identification as these defendants' Exhibit

"I" and made a part of this cross petition, the same as if copied at length herein.

That the record discloses that when the amended or supplemental administrator's final report and petition for heirship, and distribution was filed, there were some notices posted, but no notice was mailed to either of these defendants and cross petitioners and no notice was ever received by them and they did not know that their brother was dead or that his estate was being administered upon. That the order purporting to approve the administrator's final account and decree of heirship and order of distribution is void upon its face, because the statutory notices required under the laws of the State of Oklahoma to foreclose the world against any claim in the estate of the deceased was not given, and an extraneous fraud was perpetrated on the Court in procuring same and the Court was procured to make an order that has no foundation in law and which said Court was unauthorized to make, in that the County Court attempted to decree an [fol. 18] ancestral estate, so that this property, apparently, from the record, would descend to the defendants E. A. Kelleam and Nell Southard, the County Court attempting to decree an ancestral estate in personal property.

III. That the defendants, cross petitioners herein, charge that the defendants E. A. Kelleam and Nell Southard, upon the death of their brother, Leggette D. Kelleam and at the time of applying for letters of administration, confederated and connived together to perpetrate a fraud upon these cross petitioners by concealing from them the notice of the death of their brother, Leggette D. Kelleam, concealing from them the administration upon his estate, so as to procure a pretended distribution of all of said estate to the defendants, E. A. Kelleam and Nell Southard, and to carry out this fraudulent intent and purpose, the defendants, E. A. Kelleam and Nell Southard, first petitioned the County Court for the appointment of an Administrator, purposely omitting these defendants and cross petitioners as heirs, so that no notice would be required by the County Court and so that they would not know of the administration on said estate, and that thereafter and when the defendants, Mrs. Fannie Bates and Mrs. Klyde Bates, found out about this fraud and threatened to intervene in this cause and disclose to the Court the fraud that was being perpetrated, the said E. A. Kelleam and Nell Southard, immediately continued their designedly

fraudulent purpose by agreeing to pay these heirs that had discovered the fraud, the sum of Four Thousand Dollars ($4,000.00) to conceal this fraud and not disclose it to the Court and not disclose it to these cross petitioners until and so that the defendants E. A. Kelleam and Nell Southard could accomplish their fraudulent purpose of obtaining this property to be distributed to them in its entirety, without disclosing to the Court the existence of these cross petitioners.

But that, when this happened and upon advice of counsel, the said defendants E. A. Kelleam and Nell Southard conceived the unique idea of yet attempting by a legal technicality of barring these cross petitioners from ever being able to participate in and receive their distributive share from their brother's estate by hatching up and presenting to the County Court a pretended scheme and theory that this estate was an ancestral one, coming to the deceased, Legette D. Kelleam, from his mother, who was no relative of these cross petitioners, so as to cut out under the statute half brothers [fol. 19] and sisters. These cross petitioners charge that said scheme was a mere subterfuge engendered for the sole purpose of making it appear that a disclosure had been made to the County Court so as to attempt to foreclose the right of these cross petitioners to thereafter go into the issues, but that even upon this unique plan and in the zealousness and zeal of the said E. A. Kelleam and Nell Southard to get by with this fraudulent scheme, they still overlooked doing that thing which the statutes of the State of Oklahoma enjoins them to do, to-wit, giving notice to these cross petitioners by mailing to their last known address copies of the notice of the hearing upon the final account and petition for heirship and distribution, and these cross petitioners affirmatively charge that same was purposely omitted to keep them from finding out the fraud that was being perpetrated and that the said E. A. Kelleam and Nell Southard either knew the address and whereabouts of these cross petitioners, or could have found out through other members of the family that they full well did know where these cross petitioners were, but, on the contrary, they contracted with and agreed to pay and did pay the sum of Four Thousand Dollars ($4,000.00) to a part of the heirs in the same position as these cross petitioners, in order to have them keep and conceal the fraudulent intent and purpose of the said E. A. Kelleam and Nell

Southard which they, the said Mrs. Fannie Bates and Mrs. Klyde Bates, had discovered.

IV. These cross petitioners further charge that at the time E. A. Kelleam petitioned for his appointment as Administrator of the estate of Leggette D. Kelleam, he represented to the County Court of Creek County, Oklahoma, that he was a resident of Drumright, Creek County, Oklahoma, and procured the County Court to order his appointment upon the theory that he was a resident of Creek County, Oklahoma. These petitioners allege that they are informed and believe and, upon information and belief, allege to be a fact that at the time of this appointment, he was in fact a resident of Sells, Arizona, and was not entitled to be appointed Administrator, unless and until he did appoint a service agent in this State upon whom service of process could be had; that he did not do that at the time of his appointment and has never since done it, and has even now contested the right of the County Court to acquire jurisdiction over him because he was a non resident and service of process or of notice could not be had out of the County Court, [fol. 20] and these petitioners charge that that is a further overt act on his part in carrying out and in attempting to consummate his fraudulent purpose and design.

V. These cross petitioners say that at the time of the death of Leggette D. Kelleam, he left surviving him nine (9) sets of heirs, being represented by surviving brothers and sisters or half brothers and sisters, or the surviving heirs of half brothers and sisters, and that these cross petitioners herein are the sole and only surviving heirs of five (5) of these sets of heirs and that E. A. Kelleam represents another set of heirs, making a sixth (6th) set of heirs, and that Mrs. Nell Southard represents another set of heirs, making a seventh (7th) set of heirs, and that Mrs. Klyde Bates and Francis Bates represent still two additional sets of heirs, making the total of nine (9) sets of heirs; but that the last two mentioned sets of heirs have fully compromised and settled their claim to the distributive share in said estate and that the said E. A. Kelleam and Nell Southard, have, by the facts and under the circumstances hereinabove pleaded, taken or attempted to take the entire estate of Leggette D. Kelleam, but that in truth and in fact these cross petitioners are en-itled to, and upon the death of said Leggette D. Kelleam, took a distributive share in his estate equal to five

ninths (5/9ths) of the entire estate and they are entitled to 5/9th- of the property of which the deceased, Leggette D. Kelleam died seized and of which passed into the hands of E. A. Kelleam for the pretended purpose of administration, and that the title to said property, subject only to the right of the payment of debts therefrom, vested, upon the death of Leggette D. Kelleam, in these cross petitioners and that said property passed into the hands of E. A. Kelleam, impressed with the lien, right, title, equity and interest of these cross petitioners and that the said E. A. Kelleam took said property impressed with such liens and rights, the same was known to him and that under the laws of the State of Oklahoma, when he took the office of Administrator of said estate, there was created between him and these cross petitioners, as well as all other heirs, a fiduciary relation that required of E. A. Kelleam the exercise of the highest degree of faith and fidelity to seek out, find, deliver and transfer to these cross petitioners their distributive share in said estate. That this faith and fidelity owing by the said E. A. Kelleam toward these cross petitioners was breached, rav-
[fol. 21] ished and outraged, intentionally for the purpose of securing to himself and his sister all of said property and to cheat and defraud these cross petitioners thereof, and these cross petitioners are entitled to a judgment at the hands of this Honorable Court affirming and decreeing a 5/9ths interest in and to the property left in the estate of Leggette D. Kelleam, deceased, among which was the property listed in plaintiff's petition and other personal property shown by the inventory and that a lien be impressed upon all the property herein to insure and guarantee the payment to these cross petitioners of their distributive share in and to said estate, which is 5/9ths thereof, and that a Receiver be appointed to impound, hold and conserve said property until the rendition of the decree by this Honorable Court and that upon a determination of this litigation, said property be ordered and directed to be distributed, 5/9ths to these cross petitioners and that an accounting be had by the said E. A. Kelleam and Nell Southard to these cross petitioners, for the rents, issues and profits from their part of the property involved herein, together with their part of the corpus of said estate.

Wherefore, these petitioners pray this Honorable Court that a Receiver be appointed to take charge of the property

involved in this action; that the property involved in this action be decreed to be charged with a lien and ownership of these cross petitioners to the extent of 5/9ths of all of the estate of Leggette D. Kelleam, deceased; that these petitioners be decreed their distributive interest in and to said property and that they have an accounting from E. A. Kelleam and Nell Southard for their distributive share in the estate of their deceased brother, Leggette D. Kelleam, and that a lien be impressed upon all of the property, even that which would descend to E. A. Kelleam and Nell Southard for any sum or sums which by an accounting may be disclosed to belong to these petitioners, and for all other and further equitable relief that this Honorable Court may, under the facts and circumstances and the evidence that may be developed in the trial of this cause, deem these cross petitioners in equity and good conscience entitled to receive.

Heber Finch, Fred S. Armstrong and Pliney S. Fry,
by Heber Finch, Attorneys for the Defendants.

[fol. 22] (Jurat omitted per stipulation.)

Exhibits to Cross-Petition

EXHIBIT "A"

In the County Court within and for Creek County, State of Okla.

In the Matter of the Estate of Leggette D. Kelleam, Deceased

No. 4354

Petition for Letters of Administration

Comes now your petitioners, E. A. Kelleam and Nell Southard, nee Kelleam, and each of them, and respectfully show to the court:

That heretofore, to-wit, on or about August 8, 1936, Leggette D. Kelleam died in the hospital at Cushing, Oklahoma; that upon the day and date of his death he was an actual and bona fide resident of Drumright, Creek County, Oklahoma, and had property and estate in said county;

That said Leggette D. Kelleam at the day and date of his death was unmarried; that he left surviving him neither

wife, child or children, or issue of deceased child or children, nor mother, nor father, nor brother or sister, nor issue of deceased brothers and sisters except the following who are his sole and only heirs at law:

[fol. 23] E. A. Kelleam, c/o Tharel Hotel, Drumright, Oklahoma, age 54 years, and Nell Southard, nee Kelleam, Blanchard, Oklahoma, age 48 years.

That due and diligent search has been made to ascertain whether said Leggette D. Kelleam left a will and that none has been found; that your petitioners upon information and belief, as a result of said search, allege that said Leggette D. Kelleam died intestate;

That the value of the real and personal property owned and possessed by Leggette D. Kelleam at the day and date of his death is to your petitioners unknown but is believed to exceed in value the sum of $6,000.00; that the general character of said property is realty and personalty, consisting of city property, in Drumright and Oklahoma City, money, and interest in an oil lease, stocks, notes, etc., an accurate itemized list and valuation of which has not as yet been made.

Your petitioners further say that they have agreed among themselves that E. A. Kelleam be designated administrator of the estate of the said Leggette D. Kelleam; that said E. A. Kelleam is a suitable and proper person to serve in such capacity, and agrees to qualify and serve in said capacity in event of his appointment.

Wherefore, premises considered, your petitioners respectfully pray that said E. A. Kelleam be designated and appointed administrator of the estate of Leggette D. Kelleam and as such directed to proceed to administer upon said estate conformable to the laws of the State of Oklahoma and to do and perform such things as are necessarily incident to the administration thereof.

Nell Southard nee Kelleam, E. A. Kelleam, Petitioners. Glenn O. Young, Attorney for Petitioners.

VERIFICATION

STATE OF OKLAHOMA,
County of Creek, ss:

E. A. Kelleam and Nell Southard, nee Kelleam, and each of them, being first duly sworn according to law, depose and say:

That they have read and understand the above and fore-
[fol. 24] going petition and that the matters and things therein set forth are true and correct.

E. A. Kelleam, Nell Southard, nee Kelleam.

Subscribed and sworn to before the undersigned, a Notary Public in and for the State of Oklahoma, this the 13th day of August, 1936. Della Mae Johnson, Notary Public. My commission expires November 22, 1936.

EXHIBIT "B"

Order Appointing Administrator

Now on this the 13th day of August, 1936, this cause coming on for hearing on petition of E. A. Kelleam and Nell Southard, nee Kelleam, for the appointment of an administrator of the estate of Leggette D. Kelleam, and the court, having heard the evidence and being well and truly advised in the premises, finds that Leggette D. Kelleam died on August 8, 1936, that at the date of his death he was an actual and bona fide resident of Creek County, State of Oklahoma, having his residen*tc* in Drumright, in said county and state; that said Leggette D. Kelleam died intestate; that he left him surviving neither wife, child, nor children nor issue of deceased child or children, nor mother, nor father nor brothers or sisters, nor issue of deceased brothers or sisters save and except the petitioners E. A. Kelleam and Nell Southard, nee Kelleam, who are respectively a brother and sister and that E. A. Kelleam is entitled to be designated and appointed administrator of his estate upon the joint petition of him, the said E. A. Kelleam, and Nell Southard, nee Kelleam, they being the sole parties at interest, as revealed by said petition.

It Is Therefore, the Order, Judgment, and Decree of the court that said E. A. Kelleam be and he is hereby designated and appointed administrator of the estate of Leggette D. Kelleam condition- however upon his making, executing and filing bond conformable to law and subject to the approval of the undersigned as Judge of the County Court of Creek County in the sum of $12,000.00.

George D. Willhite, Judge.

[fol. 25] EXHIBIT "C"

Administrator's or Executor's Bond

THE STATE OF OKLAHOMA,
Creek County, ss.,
In County Court:

In the Matter of the Estate of Leggette D. Kelleam, Deceased

Know All Men By These Present-, That we, E. A. Kelleam, as principal and Maryland Casualty Company, Baltimore, Maryland, as sureties are held and firmly bound unto the State of Oklahoma, in the penal sum of Twelve Thousand and no/100 ($12,000.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents.

The Condition of the above obligation is such, that Whereas, by the order of the County Court of Creek County, State of Oklahoma, made and entered on the 13th day of August, A. D. 1936, the above named principal was appointed Administrator of the estate of Leggette D. Kelleam deceased, and letters of Administration were directed to issue to said principal, upon his taking and subscribing the oath required by law, and executing a bond to the State of Oklahoma, in the penal sum of Twelve Thousand and no/100ths ($12,000.00) Dollars, with two or more sureties to be approved by the Judge of said Court.

Now, if the above bounden principal shall faithfully execute the duties of such trust as such Administrator according to law, then this obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof, We have hereunto subscribed our names, this 14th day of August, A. D. 1936.

E. A. Kelleam, Principal, Maryland Casualty Company, by G. O. Shackleford, Attorney-in-fact, Surety.

I hereby approve the above bond this 24th day of August, 1936.

George D. Wilhite, County Judge.

[fol. 26] EXHIBIT "D"

Letters of Administration

STATE OF OKLAHOMA,
Creek County,
In the County Court:

In the Matter of the Estate of Leggette D. Kelleam, Deceased

E. A. Kelleam is hereby appointed administrator of the estate of Leggette D. Kelleam, Deceased.

Witness George D. Willhite, Judge of the County Court of Creek County, State of Oklahoma, with the seal thereof affixed, the 24 day of August, 1936.

George D. Willhite, County Judge.

STATE OF OKLAHOMA,
Creek County, ss:

I, E. A. Kelleam do solemnly swear that I will perform according to law the duties of administrator of the estate of Leggette D. Kelleam, Deceased. So help me God.

E. A. Kelleam.

Subscribed and sowrn to before me, this 24 day of August, 1936. George D. Willhite, County Judge.

EXHIBIT "E"

General Inventory and Appraisement

Estate of Leggette D. Kelleam, Deceased. In County Court

I, the undersigned, E. A. Kelleam, Administrator of the above Estate, make and return the following true and correct inventory of all the Real Estate and all the goods, chattels, rights, credits and Estate of Leggette D. Kelleam, deceased, except the homestead, which have come to my possession or knowledge.

EXHIBIT "E"—Continued

No.	Real Estate	App. Value
(1)	Lot 18, Blk. 5, Broadway Addn., Drumright Oklahoma	1,100.00
(2)	Lot 11, Blk. 1, Drumright Addn., Drumright, Oklahoma	400.00
(3)	Lot 7, Blk. 2, Belle Vern Addn., Oklahoma City, Okla.	3,000.00
(4)	Lot 8, Blk. 2, Belle Vern Addn., Oklahoma City, Okla.	
[fol. 27]		
(5)	Lot 29, Blk. 7, College Hill Addn., Oklahoma City, Okla.	2,000.00
(6)	Lot 30, Blk. 7, College Hill Addn., Oklahoma City, Okla.	
	Personal Property	
(7)	100 shares Idaho Copper Co., No. C33332 Par $1 a share	No Value
(8)	100 shares Idaho Copper Co., No. C48653 Par $1 a share	No Value
(9)	100 shares Idaho Copper Co., No. C48654 Par $1 a share	No Value
(10)	4 shares Crosley Radio Corp., Com. No. Co1811	120.00
(11)	Acct. No. 1571 Savings Dept., National Bank of Tulsa, Okla.	11.72
(12)	2 shares Crosley Radio Corp., Com. No. Ny 3354	68.00
(13)	96 shares Tri-State Royalty Corp., No. F 59 Tulsa, Okla.	No Value
(14)	300 shares Irwin-Davis Petroleum—Okmulgee, Oklahoma	No Value
(15)	One Royalty Deed, Undivided 10 Acre Int. in 640 Acres described as Survey 1, Blk. B 1 Public School land Winkler County, Texas	No Value
(15a)	Mineral Deed, Undivided 5 Acres *Ont.* North Half (N½) of the North East Quarter (NE¼) of Section Twenty three (23) Township Twelve (12) North Range Three (3) E	No Value
(16)	10 shares No. 246 Capitol Oil & Gas Co., Wichita, Texas	No Value
(17)	10 shares No. 147 Okmulgee Oil & Leasing Co., Ft. Worth, Texas	No Value
(18)	10 shares No. 146 Okmulgee Oil & Gas Co., Ft. Worth, Tx.	No Value
(19)	28 shares No. 380 Sneed Petroleum Co., Tulsa, Oklahoma	No Value
(20)	528/600ths *ogs* Share No. T 42 Scrip Certificate in *Capitol* Stock, Sneed Petroleum Co.	No Value
(21)	100 shares Studebaker Corp., No. NY 160490 Com.	No Value

EXHIBIT "E"—Continued

[fol. 28]

No.	Real Estate	App. Value
(22)	One Oil & Gas Lease from John D. Hill & Nellie Hill, Morris Summy & Lucie Summy to L. D. Kelleam and F. E. Vensel on Lots 6, 8 and 12 Sec. 31 Twp. 19N, R 7 E	No Value
(23)	50 shares Home State Voting Trust, of Home State Ins. Company	150.00
(24)	One invoice of Furniture in Drumright House	15.00
(25)	One Ford Coupe 1936 Model with Radio Motor # 18-2160494 actual cost $657.77	400.00
(26)	One Liquidating Agents Certificate No. 282 $115.41 half pd.	11.50
(27)	One contract between L. D. Kelleam and Harry L. Charles and Virginia Charles giving L. D. Kelleam one half interest in Royalty on book—address Wichita, Kansas	No Value
(28)	One Certificate No. 207—10 shares in Home Building & Loan Ass'n., Drumright, Oklahoma, Paid $390.00	358.00
(29)	Two shares Standard Oil Co., of Indiana No. 043930	74.00
(30)	4/10ths of a share No. 385 American State Bank, Charleston, Ark. Par $25.00	10.00
(31)	Two shares, No. 431 American State Bank, Charleston, Ark. Par $25.00	50.00
(32)	1/5th of a share No. VS23012 Columbia Oil & Gas Corp.,	No Value
(33)	1/5th of a scrip share Certificate, Columbia Oil & Gasoline Corp.,	No Value
(34)	10 shares No. C03411, Columbia Oil & Gas Corp.	30.00
(35)	5 shares No. C01624 Oklahoma Gas & Elec. Co., Par $100.	500.00
(36)	4 shares No. 9767 Oklahoma Gas & Elec. Co., Par $100.	400.00
(37)	Special Over writing Agreement of N. A. Evans Co., Tulsa Okla. Nos., 529, 530, 531, 532, 533, 534, 535, and 536	No Value
(38)	Two shares No. CN272763 Columbia Gas & Elec. Corp., Com. New York	42.00
(39)	One Oil & Gas Lease No. 10407 From W. M. Shumaker and Elizabeth Shumaker to C. G. Giblin & L. D. Kelleam	No Value

[fol.29]

(40)	One No. 99381 C. S. U. B. 5% Gold Deb—due 1950	810.00
(41)	7/16ths Int. Sam Vance Lease; SW¼ SW¼ Sec. 6-18-7 Creek County	8,610.00
(42)	One Cashier's Ck. American State Bank Charleston, Ark.	62.80
(43)	1/32 Over-riding Royalty Interest—Sam Vance Lease	1,400.00

EXHIBIT "E"—Continued

No.	Real Estate	App. Value
(44)	Nat'l Aid Life Ass'n. Policy No. M 6 803	1,000.00
(45)	Nat'l Life Insurance Co., of U. S. A. Policy No. 115532	732.00
(46)	100 shares Common Wealth Southern	312.50
	Money belonging to deceased at time of death	
	Cash	$2,437.96

Bonds, Mortgages, Notes and Accounts

	By Whom Owing	Date M'th	Day	Yr.	Amount	Credits	When Pd.	App. Value
(47)	Nell Southard, Blanchard, Okla.	1/16/		1927	$700.00	None		No Value
(48)	R. J. & Nell Southard	4/ 6/		1929	4000.00	None		No Value
(49)	Grover Keely	6/12/		1929	100.00	None		No Value
(50)	R. J. & Nell Southard	1/10/		1931	1000.00	None		No Value
(51)	Pleas Carter	4/ 3/		1935	25.00	None		No Value
(52)	R. J. & Nell Southard	9/ 8/		1931	700.00	None		No Value
(53)	J. M. Pinkston & Lou Ann Pinkston	6/22/		1929	400.00	130.00		No Value
(54)	E. E. Simpson Acct.				590.77			$590.77
(55)	I. Nadel Acct.				657.00			657.00
	Total appraised value of said estate							$25,353.25

Dated this 18th day of September, 1926.

E. A. KELLEAM (Signed).

[fols. 30-31] Oath of Executor or Administrator

STATE OF OKLAHOMA,
Creek County, ss:

E. A. Kelleam being first duly sworn says that he is the administrator of the Estate of Leggette D. Kelleam Deceased, that the above inventory by him made contains a true statement of all the estate of said decedent, except the homestead, that has come to his knowledge and possession and particular-y of all moneys belonging to said decedent, and of all just claims of the said decedent against said affiant.

E. A. Kelleam (Signed), Administrator.

Subscribed and sworn to before me September 3, A. D. 1936. My commission expires November 22, 1936. Della Mae Johnson (Signed).

* * * * * * *

[fols. 32-38] (Exhibit "F" omitted per stipulation.)

[fol. 39] EXHIBIT "G"

Stipulation of Settlement

This Contract and Agreement made and entered into between E. A. Kelleam and Nell Southard, nee Kelleam, brother and sister, respectively, of Leggette D. Kelleam, deceased, parties of the first part, and Mrs. Fannie Bates, nee Kelleam, surviving paternal half sister of Leggette D. Kelleam, deceased, and Francis Richardson, James Russell Bates and Robert Bates, children of Mrs. Klyde Bates, nee Kelleam, deceased, and Joe Bates, the surviving husband of Mrs. Klyde Bates, nee Kelleam, deceased, the said Mrs. Klyde Bates, nee Kelleam, being a paternal half sister of Leggette D. Kelleam, deceased, parties of the second part, Witnesseth:

Whereas parties of the first part have filed in the County Court of Creek County, Oklahoma, in Probate Cause No. [fol. 40] 4354, being entitled: In the Matter of the Estate of Leggette D. Kelleam, Deceased a petition for the approval of the final account, for decree of distribution, and for the determination of heirship of said estate, wherein parties of the first part, together with E. A. Kelleam, as administrator of such estate, claim that all of said estate left by the deceased at the time of his death was a maternal ancestral estate and that by reason thereof the parties of the second part are not entitled to share in the distribution of said estate; and

Whereas, parties of the second part contend that as half sister of the deceased, and as heirs of a half sister of the deceased, Mrs. Klyde Bates, nee Kelleam, deceased, they are entitled to share in the distribution of said estate for the reason that parties of the second part contend that the estate of which the deceased died seized was not an ancestral estate and that the heirs of the half blood inherit an equal share with the heirs of the whole blood.

Now, Wherefore, it is the purpose of this contract and agreement to settle and compromise the contentions between the parties hereto for a consideration of $4,000.00, to be paid by parties of the first part to the parties of the second part, as follows, to-wit:

Parties of the first part hereby agree to place in escrow and to impound herewith in the Citizens State Bank at Drumright, Oklahoma, the sum of $4,000.00, which $4,000.00

shall be delivered to parties of the second part upon the following conditions, to-wit:

That parties of the second part agree that they will not appear in the County Court of Creek County, Oklahoma, and question the petition for approval of the final account and distribution of said estate which is hereinabove mentioned and which is set for hearing on the 18th day of May 1937, and that parties of the second part will not appeal from said order and judgment.

It is further understood and agreed that if such agreement is performed by parties of the second part, and if no other party interested in such estate should appear in the County Court of Creek County, Oklahoma and contest or question the petition for distribution of said estate hereinabove mentioned, and if no person claiming to be interested in the estate should appeal from such order and [fol. 41] judgment as may be entered by the County Court of Creek County, Oklahoma, on the 18th day of May, 1937, then and in that event the parties of the second part shall be entitled to withdraw from the bank hereinabove mentioned as their individual property the sum of $4,000.00 herewith deposited in escrow.

It is further contracted and agreed that if any party claiming to be interested in such estate should appear in the County Court of Creek County, Oklahoma, at any time subsequent to this date and prior to the expiration of thirty days succeeding the 18th day of May, 1937, and question the right of parties of the first part under their petition for distribution which they have filed as hereinabove mentioned, or if the County Court of Creek County, Oklahoma, should fail to grant their petition for distribution of the estate as prayed for in said petition, or if an appeal should be lodged against such order of the County Court of Creek County, Oklahoma, providing for the distribution of said estate within a period of thirty days succeeding the 18th day of May, 1937, then it is understood and agreed that the parties of the first part shall be entitled to withdraw in their own right the sum of $4,000.00 herewith deposited in said bank, and it is further agreed and understood that if the last mention- contingency should occur that parties of the second part and none of them shall be in any wise prejudiced in the rights which they now have a claim in and to such estate, and shall have the right and authority to either appear before the County Court of Creek County, Okla-

homa, and set forth their claims as heirs to the estate of Leggette D. Kelleam, deceased, or shall have the right to appeal to the District Court of Creek County, Oklahoma, without bond on their part; it being expressly understood and provided that nothing in this contract or agreement shall prejudice the rights of the parties of the second part to set up and make lawful claim of their interest in said estate in the event the parties of the first part are entitled to a return to them of the $4,000.00 herewith deposited under the terms of this contract.

It is further stipulated that the parties of the second part by entering into this stipulation shall not be entering their appearance in the County Court of Creek County, Oklahoma, on the 18th day of May, 1937, or at any subsequent date, and that in the event parties of the second part de-
[fol. 42] sire to appeal from the order of the County Court of Creek County, Oklahoma, that parties of the second part shall have thirty days to appeal to the District Court of Creek County, Oklahoma, after the entry of the judgment upon final distribution of the estate.

It is further understood and agreed that in event the conditions and provisions of this contract are fulfilled, and that parties of the second part receive and are paid the sum of $4,000.00, as herein provided, that this contract shall constitute an assignment of any and all right, title or interest which they may have or claim to parties of the first part in and to the estate of Leggette D. Kelleam, deceased.

It is further understood and agreed that if all of the conditions of this contract and agreement are complied with so as to entitle parties of the second part to withdraw the sum of $4,000.00 herewith deposited, that upon being advised in writing by Luster Cook and Streeter Speakman to such effect, that such bank shall be authorized and directed to pay the sum of $4,000.00 by draft to Pearson & Pearson as attorneys for parties of the second part, and to deliver said draft to Luster Cook, Attorney for parties of the second part.

It is further understood and agreed that parties of the second part represent and guarantee to parties of the first part that Mrs. Klyde Bates, nee Kelleam, died on the 9th day of May, 1937, at Fayetteville, State of Arkansas, and that the parties of the second part named in the first and opening paragraph of this instrument constitute the sole

and only heirs at law, devisees and legattes of such deceased Mrs. Klyde Bates, nee Kelleam.

It is further understood and agreed that this contract shall be binding upon the parties hereto, their executors, administrators and assigns, and that such contract shall become effective and binding upon all parties hereto upon delivery of the original to said bank, together with the sum of $4,000.00 as

Witness our hands this 12th day of May, 1937.

(Signed) E. A. Kelleam, (Signed) Nell Southard, Parties of the First Part. (Signed) O. K. Streeter [fol. 43] Speakman, Attorneys for Parties of the first part.

Mrs. Fannie Bates, nee Kelleam, Francis Richardson, James Russell Bates, Robert Bates, Joe Bates, Parties of the Second Part. By Pearson & Pearson, Attorneys for Parties of the Second Part. By (Signed) Tom Pearson, By (Signed) Luster Cook, Attorneys for Parties of the Second Part.

Note: (The parties whose names are signed by the attorneys also signed the original personally.)

EXHIBIT "H"

Amended Petition for Approval of Final Account and for Decree Determining Heirship and Distribution of Estates

Comes now E. A. Kelleam, Administrator of the estate of Leggette D. Kelleam, deceased, and E. A. Kelleam and Nell Southard, nee Kelleam, in their own personal right, and for the purpose of this amended petition allege and state:

That heretofore, to-wit, on the 8th day of August, 1936, Leggette D. Kelleam departed this life, he being an actual resident in good faith of Creek County, State of Oklahoma, and having property in said county; that the deceased was unmarried and left surviving him neither child, or children, or issue of deceased children, nor mother, nor father, nor brother or sister, nor issue of deceased brothers or sisters except the following who are his sole and only heirs at law, E. A. Kelleam, brother, age 54 years, whose residence is Sells, Arizona, and Nell Southard, nee Kelleam, age 48

years, Blanchard, Oklahoma. That the deceased left surviving him no other full brothers or sisters.

That he left surviving him the following brothers and sisters of half blood, they being paternal half brothers and sisters, together with the following children of deceased paternal half brothers and sisters, to-wit: Mrs. Klyde Bates, [fol. 44] nee Kelleam, half sister, Fayetteville, Arkansas; Mrs. Fannie Bates, nee Kelleam, half sister, Fayetteville, Arkansas; Mary Perkins, nee Kelleam, deceased, was a half sister who died about the year 1932, and left surviving her the following children who survive: J. K. Perkins, Mrs. Fannie Bates, Glenn Perkins of Long Beach, California, Bessie Matthews, Santa Anna, California, Mrs. Elouise Culp of Long Beach, California; J. M. Kelleam was a half brother of the deceased, and died about the year 1903, leaving surviving him the following children who still survive; Mrs. Ethel Riddler, Ft. Smith, Arkansas, and Mrs. Dorothy Kelleam Payne, W. S. Kelleam was a half brother of the deceased, who died in the year 1908, leaving surviving him the following children, who still survive: Clifford Kelleam, and Kathleen Kelleam; Mrs. Katherine Hall, nee Kelleam, was a half sister of the deceased. She died in the year 1918, leaving surviving her the following children who still survive: Leggette Hall, Conway, Arkansas, Lamar Hall, Waldron, Arkansas, Marguerite Bradley, nee Hall, Kelleam Hall, and Mary Kate Hall; R. T. Kelleam was a half brother of the deceased, who died at a date unknown to these petitioners but prior to the death of the deceased, Leggette D. Kelleam, and the said R. T. Kelleam left surviving him the following children who still survive: F. Q. Kelleam, Amarillo, Texas, Francis Kelleam, Amarillo, Texas, Robert Kelleam, and Jim Kelleam, Eudoria, Arkansas.

Petitioners further say that the deceased died intestate and that after his death, upon petition to this court, petitioner, E. A. Kelleam was appointed administrator of his estate and such estate has been duly administered upon in all respects as provided and required by the laws of the State of Oklahoma; that said property has been duly inventoried and appraised, notice to creditors was given in all respects as provided by the laws of this state, on the 25th day of August, 1936; that all just claims have been allowed and paid and that the said administrator has pre-

pared and filed herein his final account wherein is correctly set forth all his doings as administrator of the estate of Leggette D. Kelleam, including all items of property and money received, and all claims paid, together with proper vouchers.

Your petitioners further show that Mary Ayres Kelleam, who is one and the same person as M. A. Kelleam, was the mother of the deceased, Leggette D. Kelleam, and of E. A. [fol. 45] Kelleam, and Nell Southard, nee Kelleam; that she was the step-mother of all the half brothers and sisters of the deceased hereinabove mentioned and that the said E. A. Kelleam and Nell Southard, nee Kelleam, are the only heirs of said deceased who are of the blood of the said mother, M. A. Kelleam; that all the property of which the deceased died seized was an ancestral estate coming from his said mother to the deceased. That the deceased owned at the time of his death an undivided seven-sixteenths (7/16) of the working interest and a one-eighth (1/8) of the overriding interest in the Sam Vance lease, that is to say, the following described property, to-wit:

An undivided seven-sixteenths (7/16) of the working interest and a one-eighth (1/8) of the overriding interest in a leasehold for oil and gas covering the Southwest Quarter of the Southwest Quarter of Section 6, Township 18 North, Range 7 East, Creek County, Oklahoma:

that the said mother of the deceased, during her life time and as an advancement to the said Leggette D. Kelleam, in lieu of a portion of his share of her estate, and as a gift, purchased for him all property owned by the deceased, Leggette D. Kelleam, at the time of his death.

That for the reasons hereinabove stated the said E. A. Kelleam and Nell Southard, nee Kelleam, are the sole and only heirs of the deceased, Leggette D. Kelleam, who are entitled to inherit any of such property of which he died seized and possessed.

Wherefore, Premises considered, your petitioners respectfully pray that the final account of said administrator as filed herein, together with this petition for distribution and determination of heirs, be set for hearing on a day certain to be fixed by this court; that due and legal notice of the day and date thereof be given as provided by law, and that upon final hearing herein this court, by its judgment,

find and determine that all of the property, real, personal and mixed, of which the deceased died seized, was a maternal ancestral estate, and that E. A. Kelleam, and Nell Southard, Nee Kelleam, are the sole and only heirs of the deceased entitled to inherit from the deceased, Leggette D. Kelleam; that all of the half brothers and sisters, together with the children and heirs of the said deceased half brothers and sisters hereinabove named, by order and judgment of this court, be, excluded from inheriting any property of which [fol. 46] the deceased died seized or possessed; and that all of the property, real, personal or mixed, wherever situated, of which the said Leggette D. Kelleam died seized or possessed, be vested in E. A. Kelleam and Nell Southard, nee Kelleam, each share and share alike, absolutely free, clear and discharged from all claims and demands of any other person whomsoever.

That upon making distribution of such estate as hereinabove set forth and described that the said administrator be finally discharged and released from any *and* liability herein and that his bondsmen be discharged and released.

E. A. Kelleam, Administrator; Nell Southard, nee Kelleam; Speakman & Speakman, Attorneys for Petitioners.

EXHIBIT "I"

Order Approving Administrator's Final Account, Determining Heirship, and Providing for Distribution of Estate

Now, on this 18th day of May, 1937, the above entitled action comes on regularly for hearing upon the final account filed herein by E. A. Kelleam, Administrator of said estate, together with the Amended Petition filed herein on the 27th day of April, 1937, per permission of court, for the approval of final account, for a decree determining heirship and for distribution of the estate; said administrator appearing in person and by his attorneys of record, Glenn O. Young, and Speakman and Speakman, and said E. A. Kelleam, in person, and Nell Southard, nee Kelleam, appearing by their attorneys, Speakman & Speakman, and the court being duly advised in the premises finds that said action was, by order of this court, upon the 25th day of March, 1937,

continued until the 26th day of April, 1937, and thereafter on the 26th day of April, 1937, by order of this court continued until this day and date with permission to the said petitioners to file an amended petition herein, which was filed on the 27th day of April, 1937; that publication notice was duly given in the Sapulpa Herald for hearing on this day and date, upon the administrator's final account and for distribution of said estate in all respects as [fol. 47] provided and required by the laws of this state and conforming to the former orders of this court; and

Thereupon, the following named persons who appeared in the last publication notice were three times called in open court and failed to appear either in person or by their attorneys, as follows, to-wit: Mrs. Klyde Bates, nee Kelleam, Mrs. Fannie Bates, nee Kelleam, J. K. Perkins, Mrs. Fannie Bates, Glenn Perkins, Bessie Matthews, Mrs. Elouise Culp, Mrs. Ethel Riddler, Mrs. Dorothy Kelleam Payne, Clifford Kelleam, Kathleen Kelleam, Leggette Hall, Lamar Hall, Marguerite Bradley, nee Hall, Kelleam Hall, Mary Kate Hall, F. Q. Kelleam, Francis Kelleam, Robert Kelleam, and Jim Kelleam; and

Thereupon, said proceedings were called for trial and the said administrator and petitioners above named introduced their evidence and rested, and the court being fully advised in the premises, upon the evidence adduced, finds:

That Leggette D. Kelleam died intestate on the 8th day of August, 1936, while an actual resident in good faith of Creek County, State of Oklahoma, and having property in said county; that the deceased was unmarried and left surviving him neither child, or children, or issue of deceased children, nor mother or father, nor brother or sister, nor issue of deceased brothers or sisters except the following who are his sole and only heirs at law, E. A. Kelleam, brother age 54 years, whose residence is Sells, Arizona, and Nell Southard, nee Kelleam, age 48 years, Blanchard, Oklahoma. That the deceased left surviving him no other brothers or sisters.

That he left surviving him the following brothers and sisters of half blood, they being paternal half brothers and sisters, together with the following children of deceased paternal half brothers and sisters, to-wit; Mrs. Klyde Bates, nee Kelleam, half sister, Fayetteville, Arkansas, and Mrs.

Fannie Bates, nee Kelleam, half sister, Fayetteville, Arkansas; Mary Perkins, Kelleam, deceased, was a half sister who died about the year 1932, and left surviving her the following children who survive: J. K. Perkins, Mrs. Fannie Bates, Glenn Perkins of Long Beach, California, Bessie Matthews, Santa Anna, California, Mrs. Elouise Culp of Long Beach, California; J. M. Kelleam was a half brother of the deceased, and died about the year 1903, leaving surviving him the following children who still survive: Mrs. Ethel Riddler, Ft. Smith, Arkansas, and Mrs. Dorothy [fol. 48] Kelleam Payne; W. S. Kelleam was a half brother of the deceased, who died in the year of 1908, leaving surviving him the following children, who still survive: Clifford Kelleam, and Kathleen Kelleam; Mrs. Kathrine Hall, nee Kelleam, was a half sister of the deceased. She died in the year of 1918, leaving surviving her the following children who still survive: Leggette Hall, Conway, Arkansas, Lamar Hall, Waldron, Arkansas, Marguerite Bradley, nee Hall, Kelleam Hall, and Mary Kate Hall; R. T. Kelleam was a half brother of the deceased, who died at a date unknown to these petitioners but prior to the death of the deceased, Leggette D. Kelleam, and the said R. T. Kelleam left surviving him the following children who still survive: F. Q. Kelleam, Amarillo, Texas, Francis Kelleam, Amarillo, Texas, Robert Kelleam, and Jim Kelleam, Eudoria, Arkansas.

That the deceased died intestate and that after his death, upon petition to this court, petitioner, E. A. Kelleam was appointed administrator of his estate and such estate has been duly administered upon in all respects as provided and required by the laws of the State of Oklahoma; that the said property has been duly inventoried and appraised, notice to creditors was given in all respects as provided by the laws of this state, on the 25th day of August, 1936; that all just claims have been allowed and paid and that the said administrator has prepared and filed herein his final account wherein is correctly set forth all his doings as administrator of the estate of Leggette D. Kelleam, including all items of property and money received, and all claims paid, together with proper vouchers.

That Mary Ayres Kelleam, who is one and the same person as M. A. Kelleam, was the mother of the deceased, Leggette D. Kelleam, and E. A. Kelleam, and Nell Southard, nee Kelleam; that she was the step-mother of all the half

brothers and sisters of the deceased hereinabove mentioned and that the said E. A. Kelleam and Nell Southard, nee Kelleam, are the only heirs of said deceased who are of the blood of the said mother, M. A. Kelleam; that all the property of which the deceased died seized was an ancestral estate coming from said mother to the deceased.

That the deceased owned at the time of his death the following property, to-wit:

[fol. 49] Lot 18, Block 5, Broadway Addition to Drumright, Oklahoma;

Lot 11, Block 1, Drumright Addition to Drumright, Oklahoma;

Lot 7, Block 2, Belle Vern Addition to Okla. City, Oklahoma;

Lot 8, Block 2, Belle Vern Addition to Okla. City, Oklahoma;

Lot 29, Block 7, College Hill Addition to Okla. City, Oklahoma;

Lot 30, Block 7, College Hill Addition to Okla. City, Oklahoma;

100 shares of Idaho Copper Company No. C33332

100 shares Idaho Copper Company No. C48653

100 shares Idaho Copper Company No. C48654

4 shares Crosley Radio Corporation, Common, No. C01811

Account No. 1571 Savings Dep., National Bank of Tulsa, Okla.;

2 shares Crosley Radio Corporation, Common No. NY 3354

96 shares Tri-State Royalty Corporation, No. F59, Tulsa, Okla.;

300 shares Irwin-Davis Petroleum, Okmulgee, Oklahoma;

One Royalty Deed, Undivided 10 acre int., in 640 acres, described as Survey 1, Block B. 1, Public School land, Winkler County, Texas;

Mineral Deed, Undivided 5 Acres Int. North-half of the Northeast Quarter of Section 23, Township 12 North, Range 3 East;

10 shares No. 246 Capitol Oil & Gas Co., Wichita, Texas;

10 shares No. 147, Okmulgee Oil & Leasing Co., Ft. Worth, Tex.;

10 shares No. 146, Okmulgee Oil & Gas Co., Ft. Worth, Texas;

28 shares No. 380 Sneed Petroleum Company, Tulsa, Oklahoma;

528/600ths of a share No. T 42 Scrip Certification Capitol Stock, Sneed Petroleum Company;

100 shares Studebaker Corporation, No. NY 106490 Common;

One Oil & Gas lease from John D. Hill and Nellie Hill, Morris Summy and Lucie Summy to L. D. Kelleam and [fol. 50] F. E. Vensel on Lots 6, 8, and 12, Section 31, Township 19 North, Range 7 East;

50 shares Home State Voting Trust, of Home State Ins. Co.;

One invoice of furniture in Drumright house;

One Ford Coupe 1936 Model with Radio Motor No. 18-2160494;

One Liquidating Agents Certificate No. 282.

One contract between L. D. Kelleam and Harry Charles, and Virginia S. Charles giving L. D. Kelleam one half interest in Royalty on book;

One certificate No. 207—10 shares in Home Building & Loan, Drumright, Oklahoma;

Two shares Standard Oil Co. of Indiana No. 043930;

4/10th of a share, No. 385 American State Bank, Charleston, Arkansas;

1/5th of a share No. VS 23021 Columbia Oil & Gas Corporation;

1/5th of a scrip Share Certificate, Columbia Oil & Gasoline Corp.;

10 shares No. C03411, Columbia Oil & Gas Corporation;

5 shares No. C01624, Oklahoma Gas & Electric Co.;

4 shares No. 9767 Oklahoma Gas & Electric Company;

Special overwriting agreement of M. A. Evans Co., Tulsa, Okla.;

Nos. 529, 530, 531, 532, 533, 534, 535, and 536;

Two shares No. CN272763 Columbia Gas & Elect. Corporation, Common, New York;

One oil and gas lease No. 10407 from W. M. Shumaker and Elizabeth Shumaker to C. G. Giblin and L. D. Kellean;

One No. 9938; C. S. U. B. 5% Gold Deb. due 1950

An undivided 7/16th of the working interest and a 1/8 of the overriding royalty interest in a leasehold for oil and gas known as the Sam Vance lease, and covering the Southwest Quarter of the Southwest Quarter of Section 6, Township 18 North, Range 7 East, Creek County, Oklahoma;

One Cashier's check—American State Bank, Charleston, Ark.;

National Aid Life Association Policy No. M 6,803

[fol. 51] National Life Insurance Co. of U. S. A. Policy No. 115532;

100 shares Common Wealth Southern;

E. E. Simpson, account;

I. Nadel, account;

That the said mother of the deceased, during her life time and as an advancement to the said Leggette D. Kelleam, in lieu of a portion of his share of her estate, and as a gift, purchased for him all property owned by the deceased Leggette D. Kelleam, at the time of his death, and all of said property constituted a material ancestral estate.

That by reason thereof E. A. Kelleam and Nell Southard, nee Kelleam are the sole and only heirs of the deceased, Leggette D. Kelleam, and are entitled to inherit each an undivided one-half interest, share and share alike, in and to all of the estate and property, real, personal or mixed of which the deceased died seized.

The court further finds that since the former order of this court entered herein on the 26th day of March, 1937, the administratrix has incurred the following items of expense:

J. M. Scott for operating expenses Samuel Vance lease	$165.06
Court costs for publication fee	12.50
Attorneys fees and expenses Speakman & Speakman for special services rendered to the administrator in connection with the final account	315.00

making a total of $492.56 for which said administrator is entitled to credit and deduction from the amount, now on hand in addition to the amount heretofore approved by order and judgment of this court.

It is, Therefore, Ordered, Adjudged a*dn* Decreed that the final account of said administrator be and the same is hereby in all things approved and confirmed.

It is further Considered, Ordered and Adjudged that all of the property of which the said Leggette D. Kelleam died seized was a maternal ancestral estate; that for such reason none of the half brothers or sisters or the de-cendants of half brothers or sisters surviving the said Leggette D. Kelleam are entitled to inherit any of the property of which

the deceased, Leggette D. Kelleam died seized, and each and all of such half brothers and sisters or the descendants of [fol. 52] any deceased half brothers or sisters are hereby excluded from such inheritance.

It is further ordered, Adjudged and Decreed that upon the death of the said Leggette D. Kelleam all of the property of which he died seized, including all real estate, personal property and mixed property hereinabove set forth and described, descended to and vested in E. A. Kelleam and Nell Southard, nee Kelleam, the full brother and sister of Leggette D. Kelleam, in equal shares, share and share alike; and they are hereby adjudged and decreed to be the owners each of an undivided one-half interest in all real estate in fee simple, and each the owner of an undivided one-half interest in all personal and mixed property, to the exclusion of any and all persons whomsoever.

It is further Ordered and Adjudged that said administrator is hereby ordered and directed to make distribution of all property of the deceased which has come into his hands as such administrator, in equal shares to the said E. A. Kelleam and Nell Southard, nee Kelleam, and to take their receipts therefor and upon doing so the said administrator and his official bondsmen be discharged from further liability herein.

George D. Willhite, County Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION OF PLAINTIFF FOR ORDER OF SERVICE ON DEFENDANT OUTSIDE OF DISTRICT—Filed June 25, 1938

Now comes the plaintiff by its attorneys of record, Green and Farmer and moves the Court to make and enter an order herein for service on the defendants herein, A. E. Kelleam and Joe E. Kelleam, outside this district and outside of the State of Oklahoma, and shows the Court that said defendants reside at Sells, Arizona, outside the Northern District of Oklahoma and outside the State of Oklahoma, and that they cannot be served with personal process out of this court; and for that reason they should be served

outside the district as provided for in the Statute for extended or substitute service.

Green and Farmer, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 53] IN UNITED STATES DISTRICT COURT

ORDER FOR SERVICE ON DEFENDANTS OUTSIDE OF DISTRICT—Filed July 25, 1938

Upon motion of Green and Farmer, attorneys for plaintiff in the above case and it appearing to the Court that this is an action to impound property and impress a lien on certain real and personal property located in the State of Oklahoma, and a part of said property being in the Northern District and is one of those classes of action enumerated in Sec. 57 of the Judicial Code, and that the defendants A. E. Kelleam and Joe Kelleam are not inhabitants of nor found within this District or within the state of Oklahoma, and that they have not voluntarily appeared in this action:

It Is, Therefore, Ordered, Adjudged and Decreed that the said A. E. Kelleam and Joe Kelleam, defendants herein, must appear, plead, answer or demur to the Bill of Complaint of the plaintiff and the Cross-Bills of Complaint by the other defendants herein by the 7th day of September, 1938, and in default thereof the Court will proceed to the hearing and adjudication of said suit in the same manner as if the said A. E. Kelleam and Joe Kelleam had been served with process in this District.

It Is Further Ordered that certified copies of this Order be served on the person or persons in possession or charge of the property involved in this action, if any there be.

Dated this 25th day of July, 1938.

F. E. Kennamer, District Judge.

[File endorsement omitted.]

MARSHAL'S RETURN OF SERVICE ON CERTIFIED COPY OF ORDER FOR SERVICE OUTSIDE OF DISTRICT

UNITED STATES OF AMERICA,
District of Arizona, ss:

I hereby certify and return that I served the annexed Order for Service on Defendants Outside District on the

therein named Joe E. Kelleam by handing to and leaving a true and correct copy thereof with Joe E. Kelleam personally at Sacaton in said District on the 9th day of August, A. D. 1938.

B. J. McKinney, U. S. Marshal, by F. A. Kickernell, Deputy.

[fol. 54] RETURN ON SERVICE OF WRIT

UNITED STATES OF AMERICA,
District of Arizona, ss:

I hereby certify and return that I served the annexed Order for Service on Defendants Outside of District on the therein named E. A. Kelleam by handing to and leaving a true and correct copy thereof with E. A. Kelleam at Sells in said district on the 23d day of August, A. D. 1938.

B. J. McKinney, U. S. Marshal, by Richard S. Griffith, Deputy.

Endorsed: Filed August 27, 1938. H. P. Warfield, Clerk.

IN UNITED STATES DISTRICT COURT

SPECIAL APPEARANCE AND PLEA TO THE JURISDICTION OF E. A. KELLEAM—Filed September 3, 1938

Comes now the defendant E. A. Kelleam and appearing specially and for the purpose of this motion only, respectfully shows to the court that process was not issued, served and returned herein as required by law and that this honorable court is without jurisdiction over the person of this defendant and the subject matter of this controversy.

Wherefore defendant respectfully prays that this cause be dismissed as to him and for want of jurisdiction.

Glenn O. Young, Attorney for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SPECIAL APPEARANCE AND MOTION TO DISMISS OF JOE E. KELLEAM—Filed September 3, 1938

Comes now the defendant Joe E. Kelleam and appearing specially and for the purpose of this motion only, respect-

fully shows to the court that process was not issued, served and returned herein as required by law and that this honorable court is without jurisdiction over the person of this defendant and the subject matter of this controversy.

Wherefore defendant respectfully prays that this cause be dismissed as to him and for want of jurisdiction.

Glenn O. Young, Attorney for Defendant.

[fol. 55] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SPECIAL APPEARANCE AND MOTION TO DISMISS OF J. R. SOUTHARD, JR.—Filed September 3, 1938

Comes now the defendant J. R. Southard, Jr. and appearing specially and for the purpose of this motion only, respectfully shows to the court that process was not issued, served and returned herein as required by law and that this honorable court is without jurisdiction over the person of this defendant and the subject matter of this controversy.

Wherefore defendant respectfully prays that this cause be dismissed as to him and for want of jurisdiction.

Glenn O. Young, Attorney for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SPECIAL APPEARANCE AND MOTION TO DISMISS OF NELL SOUTHARD—Filed September 3, 1938

Comes now the defendant Nell Southard and appearing specially and for the purpose of this motion only, respectfully shows to the court that process was not issued, served and returned herein as required by law and that this honorable court is without jurisdiction over the person of this defendant and the subject matter of this controversy.

Wherefore defendant respectfully prays that this cause be dismissed as to her and for want of jurisdiction.

Glenn O. Young, Attorney for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AMENDMENT TO BILL OF COMPLAINT—Filed October 24, 1938

Comes now the plaintiff and with leave of Court, having been first had and obtained to file this amendment to it's Bill of Complaint, alleges and states:

[fol. 56]

I

Plaintiff adopts all the allegations in it's Bill of Complaint, heretofore filed in said cause.

II

Plaintiff alleges that the mother of Leggette D. Kelleam was one Mary A. Kelleam who was likewise the mother of Mrs. Nell Southard and mother of E. A. Kelleam. Plaintiff further alleges the said Mary A. Kelleam died, a resident of McLain County, Oklahoma, on or about the 4th day of December 1928.

Plaintiff further alleges that the defendant E. A. Kelleam was a full brother of Leggette D. Kelleam, deceased, and Nell Southard was a full sister of the deceased, and that J. R. Southard, Jr., is the son of Nell Southard and that Joe E. Kelleam is the son of E. A. Kelleam and that the defendant herein, J. K. Perkins; Mrs. Fannie Bates; Bessie Mathews; Mrs. Elouise Culp and Glen Perkins are the children of, and the sole surviving heirs of Mary Perkins, nee Kelleam, deceased, who died prior to the death of Leggette D. Kelleam and that the said deceased Mary Perkins, nee Kelleam, was a half-sister of Leggette D. Kelleam, having a common father.

That the defendants herein, Mrs. Ethel Riddler and Mrs. Dorothy Payne are children and sole surviving heirs of J. M. Kelleam, deceased, who died in 1903 and that J. M. Killeam was a half-brother of the deceased Leggette D. Kelleam. That the defendants herein Clifford Kelleam and Kathlyn Kelleam are the children and sole surviving heirs of W. S. Kelleam, deceased, who was a half-brother of Leggette D. Kelleam and that the said W. S. Kelleam died in 1908. That the defendant herein, Leggette Hall; Marguerite Bradley (the same as Marguerite Bradley Kelleam) Lamar Hall; Mary Kate Hall (the same as M. K. Hall) and Kelleam Hall are the children and sole survivors and heirs of Mrs. Kate Hall, nee Kelleam, deceased, who died in 1918

and who was a half-sister of the deceased Leggette D. Kelleam.

That the defendant herein Dr. Fannin Kelleam, Francis Kelleam, Mrs. Jimmie Kelleam and Robert Kelleam are the children and sole surviving heirs of Dr. R. T. Kelleam, deceased, who was a half-brother of Leggette D. Kelleam and who died long prior to the death of Leggette D. Kelleam.

That Mrs. Fannie Bates and Mrs. Clyde Bates are the [fol. 57] half-sisters of the deceased Leggette D. Kelleam and that the said Mrs. Fannie Bates still lives, but that these answering defendants are informed and believe that since the death of Leggette D. Kelleam, Mrs. Clyde Bates has departed this life, but left surviving her Francis Richardson; James Russell Bates and Robert Bates her children and Joe Bates her surviving husband, who are her sole and only surviving heirs.

That Leggette D. Kelleam died a resident of Creek County, Oklahoma, on or about August 8th, 1936 unmarried.

That upon the death of the said Leggette D. Kelleam the defendant E. A. Kelleam, joined by, the defendant, Mrs. Nell Southard, filed a petition prior to August 25th 1936 in the County Court of Creek County for the appointment of E. A. Kelleam as Administrator of the estate of Leggette D. Kelleam, deceased; and that in said petition, said defendants fraudulently represented to the County Court of Creek County that they were the sole and only heirs surviving the said Leggette D. Kelleam, deceased; and that no notice of the hearing on said petition was necessary because there were no other heirs—all of which said defendants E. A. Kelleam and Mrs. Nell Southard knew was an act of such nature that a fraud was being perpetrated upon said County Court. A copy of said petition is attached to defendants cross-petition marked Exhibit "A" and is hereby referred to and made a part hereof as fully as if copied herewith.

A hearing was had upon said petition and the said defendant E. A. Kelleam was appointed Administrator of the estate of Leggette D. Kelleam, deceased; a copy of said Order is attached to defendant's cross-petition as Exhibit "B" and said exhibit is hereby referred to and made a part hereof as fully as if copied herewith. Under said Order the said E. A. Kelleam qualified as said Administrator by filing a bond, and taking the oath and upon which Letters of Administration were issued—a copy of said bonds is attached

to defendant's cross-petition, marked Exhibit "C" and said exhibit is hereby referred to and made a part hereof, the same as if copied at length herein.

Thereupon the said E. A. Kelleam after filing Letters of Administration, a copy of which is attached to defendant's cross-petition marked Exhibit "D" and said exhibit is hereby referred to and made a part hereof, filed in said cause an inventory and appraisement setting out in detail [fol. 58] the estate he received and took into his possession as such Administrator; a copy of said inventory and appraisement is attached to defendant's cross-petition as Exhibit "E" and said exhibit is hereby referred to and made a part hereof.

Plaintiff further alleges that prior to May 18th, 1937 the said defendant, E. A. Kelleam filed in said County Court his administrator's final account and petitioned for distribution; a copy of said final report is attached to defendant's cross-petition as Exhibit "I" and said exhibit is hereby referred to and made a part hereof.

Plaintiff further alleges that prior to the date of the hearing of said final account on May 18th, 1937 the defendants, Mrs. Fannie Bates, nee Kelleam and the heirs of Mrs. Clyde Bates, two of the half-sisters of the deceased, apparently found out about the death of their brother, Leggette D. Kelleam and of the administration of his estate and were about to claim a share of said estate but that on May 12th, 1937 the defendants, E. A. Kelleam and Nell Southard entered into a contract with Mrs. Fannie Bates nee Kelleam; Francis Richardson, James Russell Bates, Robert Bates, Joe Bates who were the sons of Mrs. Clyde Bates, a half-sister of Leggette D. Kelleam, deceased; a copy of which contract is attached to defendant's cross-petition as Exhibit "G" and said exhibit is hereby referred to and made a part hereof.

Plaintiff further alleges that pursuant to the said contract the defendants, E. A. Kelleam and Nell Southard prepared and filed an amendment, or a final amended account, and petition for determination of heirship and distribution of property, a copy of which is attached to defendant's cross-petition as Exhibit "H", and said exhibit is hereby referred to and made a part hereof.

And that thereafter and on the 18th day of May, 1937 the said County Court of Creek County heard said final account and purportedly made an Order covering said final account

distributing said estate to E. A. Kelleam and Nell Southard as sole heirs of Leggette D. Kelleam, deceased. Plaintiff alleges that in said amended petition for approval of the final account and decree determining heirship and distribution of the estate, the said E. A. Kelleam assisted by the said Mrs. Nell Southard, without giving notice to any of the half-brothers and sisters of the deceased Leggette D. Kelleam or heirs of the half-brothers and half-sisters of the deceased, [fol. 59] Leggette D. Kelleam perpetrated a fraud upon said County Court of Creek County by alleging that the property of which the deceased Leggette D. Kelleam died seized was an ancestral estate coming to said Leggette D. Kelleam from his mother, M. A. Kelleam who is one and the same person as Mary A. Kelleam, alleging that the said property all as shown in the administrator's inventory and appraisement had been a gift to the said Leggette D. Kelleam by the said Mary A. or M. A. Kelleam during the lifetime of the said donor, and that the said M. A. Kelleam had purchased all of the property owned by the deceased Leggette D. Kelleam at the time of his death.

Plaintiff alleges that the said M. A. Kelleam or Mary A. Kelleam—maternal ancestor of Leggette D. Kelleam and Nell Southard and E. A. Kelleam died and departed this life on or about the 4th day of December, 1928, and that in truth and effect practically all of the real-estate shown in said inventory and appraisement in the estate of E. A. Kelleam was acquired by the said E. A. Kelleam after 1928 and that particularly one bit of personalty shown on the enventory and appraisement of the estate of Leggette D. Kelleam could not possibly have been purchased by the said Mary A. Kelleam and donated or given to the said E. A. Kelleam—said personal property being a 1936 model Ford coupe—with a value of $400.00 and further that shown on said inventory and appraisement are certain promissory notes of R. J. Southard and Nell Southard one dated April 6th, 1929 in the sum of $4000.00; one dated Jan. 10th, 1931 in the sum of $1000.00; one dated September 8th 1931 in the sum of $700.00 which said promissory note could not possibly have been purchased by the said M. A. Kelleam in 1928 and given to the said Leggette D. Kelleam, deceased.

Plaintiff further alleges that no notice was mailed to any of the heirs—half brothers and sisters or children of half-brothers and sisters or heirs or half-brothers and sisters of the said Leggette D. Kelleam, deceased, as required by law,

either of the filing of the petition for the appointment of an administrator or of the hearing for approval of the administrator's final report and petition for distribution, and that the statutory notices required under the laws of the State of Oklahoma were not given. And that in all of the foregoing the said defendants E. A. Kelleam and Mrs. Nell Southard perpetrated an extraneous fraud on said County Court in procuring same and that, therefore, in truth and in fact plaintiff alleges that said half-brothers and sisters who are [fol. 60] defendants in this case are entitled to some share or portion of the estate of Leggette D. Kelleam.

Wherefore, plaintiff prays judgment as prayed for in it's Bill of Complaint filed herein, and for such other relief as this Honorable Court may in equity and good conscience deem this plaintiff entitled.

W. E. Green & J. C. Farmer, Attorneys for Plaintiff.

(Jurat omitted per stipulation.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

JOURNAL ENTRY OVERRULING SEPARATE SPECIAL APPEARANCE AND MOTION TO DISMISS OF JOE E. KELLEAM, J. R. SOUTHARD, JR., AND NELL SOUTHARD, AND SPECIAL APPEARANCE AND PLEA TO THE JURISDICTION OF E. A. KELLEAM—Filed January 23, 1939

Now on this the 6th day of January, 1939, this cause coming on for final disposition on Special Appearance and Motion to Dismiss of Joe E. Kelleam, J. R. Southard, Jr., and Nell Southard and Special Appearance and Plea to the Jurisdiction of E. A. Kelleam, and the Court, having duly considered said motions.

[fol. 61] It Is Ordered that said motions, and each thereof, be severally overruled, to which defendants severally except and exceptions are allowed.

It is further ordered that said defendants file answer within twenty days.

F. E. Kennamer, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE CROSS-PETITION—Filed January 25, 1939

Come now the defendants E. A. Kelleam, Mrs. Nell Southard, J. R. Southard, Jr. and Joe E. Kelleam, and each of them, and appearing specially and for the purpose of this motion only respectfully show to the court that defendants Mrs. Ethel Riddler, Mrs. Dorothy Payne, J. K. Perkins, Mrs. F. Bates, Glen Perkins, Bessie Mathews, Mrs. Elouise Kulp, Leggette Hall, Lamar Hall, Marguerite Bradley Kelleam, Mary Kate Hall, Kelleam Hall, Clifford Kelleam, Kathleen Kelleam, Dr. Fannin Kelleam, Francis Kelleam, Mrs. Jimmie Kelleam, and Robert Kelleam have filed in this court and in this proceeding pleading designated Cross-Petition, wherein they attempt to assert a cause of action against these defendants, and in this connection these defendants respectfully aver that this Honorable Court is without jurisdiction over the subject matter or parties involved in said denominated Cross-Petition.

Wherefore, premises considered, these defendants pray that same be stricken from the files and records herein for want of jurisdiction in the court.

Glenn O. Young, Attorney for defendants, E. A. Kelleam, Nell Southard, J. R. Southard, Jr., and Joe E. Kelleam.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF THE DEFENDANT E. A. KELLEAM—Filed January 25, 1939

Comes now the defendant, E. A. Kelleam and not waiving but expressly reserving questions of jurisdiction over the person of the defendant and the subject matter of this [fol. 62] action, heretofore raised in this cause, by order of the court, for answer to the Bill of Complaint and amendments to Bill of Complaint, presented and filed herein by the plaintiff, alleges:

1. Defendant admits that plaintiff is a corporation, duly organized and existing under the laws of the State of Mary-

land, with its principal place of business at Baltimore and further admits that it is engaged in business within the State of Oklahoma.

2. Defendant admits that at the day and date of the institution of this action he was a resident of Sells, Arizona; admits that Nell Southard and J. R. Southard, Jr. are residents of the State of Oklahoma and that Joe E. Kelleam is a resident of the State of Arizona. This answering defendant is not advised concerning the residence and citizenship of all of the other defendants but on information and belief denies that they are residents and citizens of the State of Arkansas and of the State of Oklahoma and denies that part of said defendants live in the State of Oklahoma and within the Northern District of Oklahoma, and that they may be served with process out of this court.

3. This defendant admits that in the early part of the year 1936, Leggette D. Kelleam, then a resident and citizen of Creek County, Oklahoma, died; admits that the defendant, E. A. Kelleam, was by the County Court of Creek County, Oklahoma, duly appointed as administrator of his estate and that as a condition precedent to him qualification as such administrator he was required to give an Administrator's Bond in the sum of $10,000, and admits that the plaintiff herein became surety on said bond and that said bond was duly filed in the Probate Court of Creek County, Oklahoma; admits that said bond was approved and that said E. A. Kelleam took the oath of office and fully qualified and took charge of all the assets and property of the deceased, Leggette D. Kelleam, consisting of both real and personal property. And for further answer this defendant asserts that said property was truly and correctly inventoried and appraised, conformable to the laws of the State of Oklahoma and avers that a true and correct inventory thereof was on file in said court and available to the plaintiff at the time its suit was instituted.

4. This defendant admits that the value of the property set forth in said inventory is in excess of the sum of $3000.00 but expressly denies that the controversy herein involves [fol. 63] more than $3000.00 or is in excess of the amount qualifying this court with jurisdiction.

5. Defendant admits the residence of the plaintiff and this defendant, as hereinabove set forth, but denies that this

controversy is between residents and citizens of separate and different states but on the contrary avers that whatever, if any, justiciable dispute is disclosed by plaintiff's Bill of Complaint is between residents and citizens of the same state, that is to say, the State of Oklahoma. This answering defendant further expressly denies that this action involves as between plaintiff and this defendant any property located within the Northern District of Oklahoma and expressly denies that this Honorable court has jurisdiction of the subject matter and parties to this action.

6. This defendant for further answer admits that by virtue of the authority vested in him as administrator of the estate of Leggette D. Kelleam he took charge of the property of the deceased, administered it and presented and filed in the County Court of Creek County, Oklahoma, his Final Account and Amended Final Account; that the same was heard by the County Court of Creek County, Oklahoma; that said court made an order approving said final account, determining heirship and decreeing distribution of the property remaining in the hands of this defendant and avers further that said property was distributed conformable to the terms and conditions of said decree.

7. For further answer this defendant avers that notice of the presentation and filing of said final account and petition for distribution and of said Amended Petition for Distribution was given by publication as required by the statutes of the State of Oklahoma. This answering defendant further alleges that no appeal was taken from said decree of said County Court of Creek County and that the same became final and is res judicata on all issues tendered or sought to be raised by the plaintiff in this proceeding; that said decree has at no time been vacated, modified or set aside in any manner or proceeding provided by law but that on the contrary proceedings instituted in said County Court in an attempt to vacate said decree have been decided in favor of this answering defendant and against his adversaries in said proceeding, including Mrs. Ethel Riddle, Mrs. Dorothy Payne, and others, from which said judgment [fol. 64] no appeal has been prosecuted in the time and manner provided by the statutes of the State of Oklahoma.

8. This defendant further admits that he conveyed to his son, Joe E. Kelleam; and that his codefendant, Mrs. Nell

Southard, conveyed to J. R. Southard, Jr., certain property acquired as they, and each of them, had a lawful right to do and expressly denies that said conveyances are void.

9. This defendant expressly denies that unless the property involved in this action is impounded and held intact said property will be dissipated and will not be available to satisfy any lawful claims or demands of the plaintiff, if any such it have against said property, and in this connection expressly denies that said plaintiff has any right, title, interest, equity or estate of any kind or character in and to said property whatsoever.

10. This answering defendant neither affirms or denies that in the ambiguous and uncertain contingencies set forth in paragraph five of plaintiff's Bill of Complaint "said claimed heirs will fall back on and require the plaintiff herein to pay; as surety on the bond of E. A. Kelleam, the distribute shares that may be awarded to the contesting heirs" but avers that any liability of the plaintiff against this defendant arising therefrom is so speculative, inchoate and uncertain that it cannot possibly give rise to any cause of action in favor of the plaintiff and against this defendant and in this connection asserts that plaintiff's Bill of Complaint and amendment thereto shows no present liability.

11. Defendant expressly denies that plaintiff is entitled to have property in the hands of E. A. Kelleam or Mrs. Nell Southard impounded and held intact and preserved to await the final order or judgment that may be rendered in the controversy between A. E. Kelleam and Mrs. Nell Southard upon the one hand and the plaintiff in this case upon the other hand; and further in this connection this defendant expressly denies that this Honorable Court has jurisdiction to appoint a receiver as an ancillary and supplemental remedy to an action which plaintiff's Bill of Complaint indicates is pending in the County Court of Creek County, Oklahoma.

12. This defendant further expressly denies that any property in which plaintiff has an interest, either legal or equitable, is being dissipated, wasted or lost, as alleged by [fol. 65] plaintiff save and except as the result of plaintiff's wrongful intermeddling therewith.

13. For further answer this defendant avers that the question of fact as to who are the heirs of Leggette D. Kelleam and as such entitled to inherit his property has been fully and finally settled by the County Court of Creek County, Oklahoma, said court having jurisdiction over the subject matter and the property, which said judgment has become final and binding and now constitutes conclusive evidence of the fact of heirship; that said judgment has been fully and finally executed and has not been vacated, set aside or modified in any proceeding provided by law, by virtue of which facts and circumstances the matter sought to be herein relitigated are res judicata, and further in this connection this defendant avers that this action is not being prosecuted by the real party in interest; this defendant expressly denies that the several other persons named in plaintiff's Bill of Complaint are entitled to participate in said estate.

14. This defendant further expressly denies that there was any fraud or misrepresentation incident to proceedings had in the County Court of Creek County, Oklahoma, and avers further that the identical matters sought to be herein relitigated were submitted to and finally determined by said County Court, conformable to the laws of the State of Oklahoma.

15. For further answer defendant denies each and every material allegation in plaintiff's Bill of Complaint and amendment thereto which is contrary to the allegations hereinabove set forth.

Glenn O. Young, Attorney for Defendant E. A. Kelleam.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF THE DEFENDANT JOE E. KELLEAM—Filed January 25, 1939

Comes now the defendant Joe E. Kelleam and, not waiving but expressly reserving his plea to the jurisdiction, heretofore presented and filed in this cause, by order of court presents and files answer to the Bill of Complaint and

Amendment thereto and for his answer adopts each, every [fol. 66] and all the allegations in the answer of his co-defendant, E. A. Kelleam, this date filed, as fully as though repeated verbatim herein.

Glenn O. Young, Attorney for defendant Joe E. Kelleam.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF THE DEFENDANT J. R. SOUTHARD, JR.—Filed January 25, 1939

Comes now the defendant J. R. Southard, Jr. and, not waiving but expressly reserving his plea to the jurisdiction, heretofore presented and filed in this cause, by order of court presents and files answer to the Bill of Complaint and Amendment thereto and for his answer adopts each, every and all the allegations in the answer of his co-defendant, E. A. Kelleam, this date filed, as fully as though herein repeated verbatim.

Glenn O. Young, Attorney for defendant J. R. Southard, Jr.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF THE DEFENDANT NELL SOUTHARD—Filed January 25, 1939

Comes now the defendant Nell Southard and, not waiving but expressly reserving her plea to the jurisdiction, heretofore presented and filed in this cause, by order of court presents and files answer to the Bill of Complaint and Amendment thereto and for her answer adopts each, every and all the allegations in the answer of her co-defendant, E. A. Kelleam, this date filed, as fully as though herein repeated verbatim.

Glenn O. Young, Attorney for defendant Nell Southard.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

INVENTORY—Filed May 4, 1939

Your receiver respectfully shows this Honorable Court that he has now in his possession the following described properties:

(1) Oil and gas lease covering 7/16ths of 5/8ths of the [fol. 67] working Interest in the SW¼ of the SW¼ of Section 6, Township 18 North, Range 7 East, Creek County, State of Oklahoma.

Lots 29 and 30 Block 7 College Hill Addition to the City of Oklahoma City, Oklahoma County, Oklahoma, and the houses thereon situated.

Lots 7 and 8 Block 2 Belle Verne Addition to the City of Oklahoma City, Oklahoma County, Oklahoma and the house thereon situated.

Lot 18 Block 5 Broadway Addition to the City of Drumright Creek County, Oklahoma and the house thereon situated.

Lot 11, Block 1, Drumright Addition to the City of Drumright, Creek County Oklahoma, and the house thereon situated.

Cash Received to March 1st, 1939:

Rent—Lot 18, Block 5, Broadway addition	$20.00
Lot 11 Block 1, Drumright Addition	10.00
Cash received for oil produced from SW SW Sec. 6-18-7e Creek County, state of Oklahoma	$2800.00

J. M. Scott, Receiver.

STATE OF OKLAHOMA,
County of Tulsa, ss:

J. M. Scott, of lawful age, bein- first duly sworn, upon oath deposes and says: th-t he is the receiver in the above stated inventory—that he has read said inventory and knows the facts, matters and things therein contained, and that the facts, matters and things therein set forth are true and correct, as he verily believes.

J. M. Scott.

Subscribed and sworn to before me this 4th day of May, 1939. Hettie M. Tiederman, N. P. My commission expires 2-16-1941. (Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

JOURNAL ENTRY OVERRULING MOTION TO STRIKE CROSS-PETITION—Filed June 12, 1939

Now on this the 2nd day of June, 1939, this cause comes on for hearing on motion of the defendants, E. A. Kelleam, Mrs. Nell Southard, J. R. Southard, Jr. and Joe E. Kelleam, they appearing separately and praying that the Court hold, adjudge and decide that it is without jurisdiction over the [fol. 68] subject matter or parties involved in said denominated cross-petition and suggesting that the same be stricken for want of jurisdiction in the Court and said plaintiff appearing by W. E. Green, its attorney, said movants by Gleen O. Young, their attorney, and said co-defendants, by Heber Finch, their attorney, thereupon the Court orders that the said motion to strike for want of jurisdiction be overruled and directs that said moving defendants answer herein within ten days from this date to which said defendants except and exceptions are by the Court allowed.

F. E. Kennamer, Judge.

OK—Heber Finch, Glenn O. Young.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF DEFENDANTS, E. A. KELLEAM, MRS. NELL SOUTHARD, J. R. SOUTHARD, JR., AND JOE E. KELLEAM—Filed June 7, 1939

Comes now the defendants, E. A. Kelleam, Mrs. Nell Southard, J. R. Southard, Jr., and Joe E. Kelleam, and not waiving but expressly reserving questions of jurisdiction over the person of each of said defendants and the subject matter of this action heretofore raised in this cause, by order of the Court for answer to the cross-petition of the defendants, Mrs. Ethel Riddler, Mrs. Dorothy Payne, J. K. Perkins, Mrs. F. Bates, Glen Perkins, Bessie Mathews, Mrs. Elouise Kulp, Legette Hall, Lamar Hall, Marguerite Bradley Kelleam, Mary Kate Hall, Kelleam Hall, Clifford

Kelleam, Kathleen Kelleam, Dr. Fannin Kelleam, Francis Kelleam, Mrs. Jimmie Kelleam, and Robert Kelleam allege:

1. That this Court is without jurisdiction over the persons of these defendants or subject matter sought to be litigated in defendants' cross-petition for that there is neither diversity of citizenship nor any federal question involved in the matters set forth in said cross-petition as disclosed upon the face thereof.

2. That said matters sought to be herein litigated between said cross-petitioners and these defendants have been fully and finally adjudicated by the County Court of Creek County in a proceeding duly and regularly instituted in the County Court of said county which Court had jurisdiction over the subject matter and the parties. That said [fol. 69] judgment so entered was entered on May 18, 1937, that a true and correct copy thereof is attached to said cross-petition; that cross-petitioners herein did not except thereto or appeal therefrom in the manner and form required by the statutes of the State of Oklahoma; that thereafter defendants and cross-petitioners in said Court instituted and prosecuted to a conclusion proceedings to vacate and set aside said judgment so entered which were by said Court determined adversely to them; which said judgment constitutes a valid and binding determination of the issue herein and for said additional cause, the matters sought to be herein relitigated are res judicata.

3. For further answer to said cross-petition, these defendants and each plead that said cross-petitioners are barred by laches and limitations from the prosecution of this proceeding in this Court and they further allege that having elected and prosecuted to a conclusion a remedy available to them under the law in the County Court of Creek County, Oklahoma, they are precluded from attempting to re-litigate the identical issues in this court.

4. For further answer, these defendants, severally, aver that neither they nor anyone acting in their behalf or by their authority, committed any act alleged by said cross-petitioners which constituted or would constitute a fraud upon the Court or said cross-petitioners, but on the contrary aver that the full and true facts, as these defendants conceive

them to be and assert they are, were submitted to the County Court of Creek County, Oklahoma, and by said Court determined, finally and conclusively. Further in this connection, the defendants, severally and each for himself or herself assert that neither is now, nor at any time heretofore, has acted as agent for the other or by virtue of his authority and expressly deny that they at any time acted in collusion each with the other or with each other.

5. Defendants admit that there have been divers assignments and transfers of interest of said property but deny that the same are, in any manner fraudulent, irregular or illegal but on the contrary assert that valid title became vested by virtue thereof in the grantee in each said assignment or transfer.

6. Defendants, for further answer, deny that cross-petitioners have not an adequate remedy at law or are entitled to any relief in equity and expressly deny that this Court is [fol. 70] vested with jurisdiction or authority to appoint a receiver for the property described in said cross-petition, part of which is personalty, and realty and beyond the territorial jurisdiction of this Court.

7. For further defense, these answering defendants assert that said cross-petitioners and plaintiff herein, through their attorney, as these defendants verily believe and assert the fact to be, are acting in and have been in collusion with each other in an effort to foster litigation in this Court and to harrass and annoy these defendants by vexatious litigation, well knowing that both plaintiff herein and these answering defendants have been exonerated by two previous judgments; that there exists secret understanding between them to the effect that said cross-petitioners shall not assert a liability against the plaintiff in exchange for plaintiff's aid in promoting litigation against these defendants; further in this connection, these defendants aver that through mutual connivance, plaintiff and said cross-petitioners procured the appointment of a receiver for property of these defendants without notice to them or their attorney and thereby deprived them of the opportunity to be heard, and deprived them through said receiver, of the use of their property without due process of law and in violation of their just rights by withholding from the Court which appointed said receiver, material information which they well knew these defendants

would furnish were they properly notified. For further answer, these defendants deny each and every material allegation of said cross-petitioners which is contrary to the allegations herein contained or which purport to state grounds for a cause of action against them.

Glenn O. Young, Attorney for Defendants.

[File endorsement omitted.]

Copy served on cross petitioners and Plaintiffs this June 5, 1939—by mail to which I certify.

Glenn O. Young.

IN UNITED STATES DISTRICT COURT

AMENDMENT TO ANSWER AND PLEA IN ABATEMENT—Filed January 21, 1939

Comes now the defendants Nell Southard and R. J. Southard, Jr., and by leave of court file this their amended answer and plea in abatement.

[fol. 71] 1st. To plaintiffs' petition,

2nd. To cross-petition filed herein by certain co-defendants, and for grounds therefor respectfully show to the court that heretofore, towit, on December 7th, 1937, there was instituted in the District Court of Creek County, Oklahoma, said court being a court of general jurisdiction, a certain action wherein Ethel Riddler and Dorothy Payne were plaintiffs and the defendants herein save and except said Ethel Riddler and Dorothy Payne were defendants and wherein plaintiff herein was defendant, said cause being regularly docketed and filed as cause number 22999; that summons was duly issued in said cause and served upon certain of the parties defendant therein, that the petition in said cause reveals that said plaintiffs therein have alleged and set forth the identical cause of action and controversy attempted to be set forth herein; that in the event the County Court of Creek County, Oklahoma, has not exclusive jurisdiction of the controversy herein attempted to be litigated, then and in that event the District Court of Creek County, Oklahoma, by virtue of aforesaid proceedings acquired and now has complete jurisdiction over the subject matter of plaintiff's petition and defendants cross-petition herein, that said court is a court of general jurisdiction under the laws of the State

of Oklahoma, that said cause remains pending and undetermined in said District Court of Creek County, Oklahoma, by virtue of which facts and circumstances this court does not have jurisdiction to hear and determine the identical matter sought to be adjudicated herein; that these defendants are entitled to have this action abated and dismissed for that there is a prior action pending and said defendants Ethel Riddler and Dorothy Payne have elected a remedy and their cross-petitioning co-defendants and the plaintiff herein have acquiesced in said election.

These defendants adopt each, every and all the allegations of their original answer as though repeated herein verbatim.

Wherefore, premises considered, these defendants pray this action be abated and dismissed for want of jurisdiction in the Federal Court,

1st. Because of prior action instituted and determined in the County Court of Creek County, Oklahoma,

2nd. By virtue of action instituted and pending in the [fol. 72] District Court of Creek County, Oklahoma, as hereinbefore set forth.

Glenn O. Young, Attorney for defendants Nell Southard and R. J. Southard, Jr.

[File endorsement omitted.]

Copy served on adverse points this 21st day of June, 1939.
Glenn O. Young.

IN UNITED STATES DISTRICT COURT

REQUEST OF DEFENDANTS E. A. KELLEAM, E. A. KELLEAM, JR., NELL SOUTHARD, AND R. J. SOUTHARD, JR., FOR SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed June 21, 1939.

Come now the defendants, E. A. Kelleam, E. A. Kelleam, Jr., Nell Southard and R. J. Southard, Jr., and respectfully pray that the Court make the following findings of fact:

FINDINGS OF FACT

No. 1—That on August 13, 1936, there was filed in the County Court of Creek County, Oklahoma, a Probate Proceeding designated and styled "In the Matter of the Estate

of L. D. Kelleam, deceased,'' said proceeding being instituted by the presentation and filing by the defendant, E. A. Kelleam herein, of his petition for Letters of Administration wherein he recited that L. D. Kelleam had died intestate, a resident of Creek County, Oklahoma, and wherein he prayed appointment of himself as Administrator of the Estate of L. D. Kelleam; that thereafter, there was presented and filed in said Court a Waiver, wherein the defendant Nell Southard joined in the application for Letters of Administration and agreed and consented that the prayer of the petition of E. A. Kelleam be granted.

No. 2—That E. A. Kelleam and Nell Southard were the sole brother and sister of the decedent, L. D. Kelleam, of the whole blood; that thereafter, the Court entered an order designating and appointing E. A. Kelleam the Administrator of said Estate, conditioned upon the execution and filing by him of an Administrator's Bond in the sum of Ten Thousand Dollars, ($10,000.00); that thereafter said E. A. Kelleam, as principal, and plaintiff herein, Maryland Casualty Company, a corporate surety for hire, as surety, executed and filed in said County Court, an Administrator's Bond wherein [fol. 73] and whereby said plaintiff became surety for the faithful performance of his duties by said E. A. Kelleam as Administrator; that said Bond was duly approved by the County Court and Letters of Administration issued when and whereby said E. A. Kelleam, as Administrator entered upon the discharge of the duties of his office as such.

No. 3—That thereafter said Administrator presented and filed in the County Court of Creek County his Final Account and Petition for Determination of Heirship for Distribution, and for his Discharge as Administrator; that the County Court of Creek County, Oklahoma, directed the manner and form in which hearing of said Petition for Final Distribution and Determination of Heirship should be had and notice thereof should be given, which was conformable thereto, given by publication in the manner required by the Statutes of the State of Oklahoma.

No. 4—That in his Petition for Determination of Heirship and Distribution, said E. A. Kelleam averred and asserted that he and said Nell Southard were the sole and only heirs-at-law of L. D. Kelleam, deceased. That the County Court of Creek County, upon the day and date

appointed for said hearing found, adjudged and determined said E. A. Kelleam and Nell Southard to be the sole and only heirs of L. D. Kelleam, deceased, and ordered said Estate distributed accordingly.

No. 5—That thereafter said Administrator filed and presented in the County Court of Creek County, Oklahoma, another and subsequent Petition for Distribution of Heirship and Decree of Distribution, wherein he recited that the estate of L. D. Kelleam in his hands was an ancestral estate and as such that title thereto, upon the death of said L. D. Kelleam, vested in said E. A. Kelleam and Nell Southard as representatives of said Ancestor, the mother of the deceased L. D. Kelleam, through whom, it was asserted said Estate had been acquired; that notice by publication was given pursuant to an order of the County Court of Creek County, to all persons asserting or claiming to be heirs of said L. D. Kelleam, deceased, including the Cross-Petitioners herein; that thereafter, and on the day and date appointed for said hearing, the County Court of Creek County entered its judgment, order and decree, finding and determining said Estate to be ancestral, and ordering distribution thereof to E. A. Kelleam and Nell G. South-
[fol. 74] ard, whom the count found to be the sole and only heirs of L. D. Kelleam, and entitled thereto.

No. 6—That thereafter no Appeal was prosecuted from said determination within thirty days thereafter; that said Estate was distributed by said E. A. Kelleam conformable to the determination of said Court, and said Administrator, by order or the said Court, fully and finally discharged and his bond exonerated.

No. 7—That thereafter, and after the expiration of thirty days from the entry of said last named decree of Distribution and Determination of Heirship, the cross-petitioners herein instituted and filed in the County Court of Creek County a proceeding to vacate and set aside said Decree of Distribution, and presented for the determination of the County Court of Creek County the identical issues tendered in their cross-petition presented and filed in this court; that said County Court of Creek County, after hearing said matter, entered its Decree denying the prayer of cross-petitioners' petition, from which determination said cross-petitioners prosecuted and appeal to the District

Court of Creek County, which matter remains therein undetermined.

No. 8—That the plaintiff herein was made a party to said proceedings in the County Court of Creek County to vacate said Decree, and appeared therein and participated in the trial of said action.

No. 9—That on December 7, 1937, Ethel Ridling and Dorothy Payne, the cross-petitioners, instituted and filed in the District Court of Creek County, an action wherein they were plaintiffs, the defendants, E. A. Kelleam, Nell Southard, R. J. Southard, Jr., and E. A. Kelleam, Jr., said action being regularly docketed and styled as Cause No. 22,999; that processes issued out of said court in said action; that therein said plaintiffs designated as defendants, the remaining cross-petitioners herein, and the plaintiffs herein, and presented for the determination of said court substantially the same issue as tendered in their cross-petition and as sought to be adjudicated herein; that said proceedings were instituted in the District Court of Creek County and remains pending therein undetermined.

No. 10—The Court finds as a matter of fact that at the time of the institution of this proceeding, Nell Southard, [fol. 75] R. J. Southard, Jr., were not residents within the Northern District of Oklahoma; that said R. J. Southard, Jr., asserted title to certain property by virtue of conveyances from Nell Southard; and that neither E. A. Kelleam or E. A. Kelleam, Jr., were desidents of the State of Oklahoma; that neither of said defendants last named were served with process within the Northern District of Oklahoma, and that said E. A. Kelleam was never served with process, save by constructive service by publication herein; that E. A. Kelleam Jr., asserts title to certain property, formerly part of the Estate of L. D. Kelleam, by virtue of conveyances from E. A. Kelleam; that part of the property for which a receiver was appointed herein was personal property not located within the Northern District of Oklahoma, nor in the State of Oklahoma, and that part of the real property involved herein was not located in the Northern District of Oklahoma.

No. 11—At the time of the institution of this proceeding, the plaintiff was advised of all of the facts hereinabove set forth, and notwithstanding that the appointment of a re-

ceiver was pre-emptory and without notice given or an opportunity to be heard afforded said defendants or either of them, or their attorney.

No. 12—That said Receiver was appointed and took charge of the assets and property formerly belonging to the estate of L. D. Kelleam, deceased, and deprived said defendants of their right to possession and management thereof.

CONCLUSION OF LAW

These defendants pray that the Court conclude as follows:

No. 1—That this Court has no venue or jurisdiction over the persons and subject matter sought to be herein adjudicated.

No. 2—That the Court herein has no jurisdiction to appoint a receiver for property in aid of an action pending in the County Court of Creek County, Oklahoma.

No. 3—That the jurisdiction of the County Court of Creek County, Oklahoma, to administer upon the Estate of decedent is plenary and that having assumed jurisdiction for said purpose, its jurisdiction precludes the intervention of the Federal Courts for the purpose of determining issues upon their merits, setting aside Decrees, Judgments and [fol. 76] Proceedings had in said Court or granting ancillary relief in the way of appointing a Receiver.

No. 4—That in event the County Court having obtained plenary jurisdiction over all matters sought to be herein litigated, then, and in that event, the District Court of Creek County, by institution and filing of said Cause No. 22,999, acquired a prior jurisdiction to adjudicate and determine the issues sought to be herein adjudicated by plaintiff's petition and cross-petition of certain defendants; that for said cause, defendants herein are entitled to have their plea in abatement sustained and this cause dismissed.

No. 5—That failure of E. A. Kelleam to state in his petition for distribution that cross-petitioners herein were heirs of L. D. Kelleam, deceased, contrary to his view of the facts and the law, does not, in law, amount to fraud.

No. 6—That E. A. Kelleam was, as a matter of law, entitled to be appointed Administrator of the Estate of L. D. Kelleam, deceased.

No. 7—That an erroneous determination of a question of law or fact by the County Court of Creek County, Oklahoma, does not vest the United States District Court with Jurisdiction to review, vacate or set aside a judgment of that court or to exercise probate jurisdiction to determine heirs of said decedent.

No. 8—That the identical matters sought to be herein adjudicated have heretofore been determined by the County Court of Creek County, Oklahoma, and that this court is without jurisdiction to vacate or set aside said determination.

No. 9—That after judgment in its favor in the County Court of Creek County, Oklahoma, and after having been, by order of said court, released and relieved from liability upon its bond, the Federal Court may not, at the instance of the surety, appoint a Receiver while said proceedings are pending on appeal upon the assumption that the judgments and orders of the County Court of Creek County are erroneous, and void, and set aside upon appeal, the presumption being that judgments of inferior courts are regular and in conformity of law.

No. 10—That the object and purpose of proceedings instituted in the County Court of Creek County was to exonerate the bond, insofar as plaintiff is concerned, that that object [fol. 77] having been accomplished by the favorable decision of the County Court, said surety has no lawful right or authority to obtain and procure the appointment of a receiver in an independent action instituted in the Federal Court for that purpose upon the assumption that the order exonerating it was erroneous; that if plaintiff conceives itself to be obligated to any parties to this proceeding, it should discharge its obligation and thereafter seek redress by subrogation or otherwise, if any it has; that it will not be entitled to the harsh remedy of a receiver, upon the assumption that it may be liable, the while denying its liability.

No. 11—That the receiver herein having been appointed without notice, and over property beyond the jurisdiction of this court, and in a proceeding wherein plaintiff knew defendants, E. A. Kelleam, E. A. Kelleam, Jr., Nell Southard, and R. J. Southard, were without the territorial jurisdiction of the court and could not be reached by process

lawfully issued out of this court, and with knowledge on the part of the persons procuring said receivership, of the proceedings in the County Court of Creek County, Oklahoma, and in the District Court of Creek County, Oklahoma, constituted an abuse of the processes of the Court and was erroneous and that said Receiver should be discharged at the costs of the plaintiffs; and the defendants affected by said receivership restored to all rights of every kind and character lost by virtue thereof.

Respectfully submitted, Glenn O. Young, Attorney for E. A. Kelleam, E. A. Kelleam, Jr., Nell Southard, and R. J. Southard, Jr.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Findings of Facts and Conclusions of Law—Filed September 26, 1939

FINDINGS OF FACT

The Court makes the following Findings of Fact in the above captioned cause.

I

That Leggette D. Kelleam, a resident of Creek County, State of Oklahoma, died intestate on the 8th day of August, 1936, and that on August 13, 1936, there was filed in the [fol. 78] County Court of Creek County, Oklahoma, a probate proceeding designated and styled "In the Matter of the Estate of Leggette D. Kelleam, deceased", said proceeding being instituted by two of the defendants, E. A. Kelleam herein and Nell Southard, wherein it was prayed that E. A. Kelleam be appointed as Administrator of the estate of Leggette D. Kelleam, deceased.

The said petition alleged that E. A. Kelleam and Nell Southard were the sole and only heirs being brother and sister of the deceased, Leggette D. Kelleam. And in said petition the defendant Nell Southard joined in the petition for Letters of Administration and filed in said Court a waiver wherein she agreed and consented that the said defendant E. A. Kelleam be appointed administrator of the

estate of Leggette D. Kelleam, deceased, but the Court finds that at the time of the death of Leggette D. Kelleam, deceased, he was survived by the following who are his sole heirs at law, and who were entitled to share in the estate of Leggette D. Kelleam, and that the names and places of residence of said heirs are as follows:

Children of the deceased half sister, Mary Perkins, nee Kelleam, as follows:

1. J. K. Perkins, Milwaukee, Wisconsin.
2. Mrs. Fannie Bates, nee Perkins, Yorbalinda, California.
3. Mrs. Bess K. Mathis (Named as Mrs. Bessie Bates in the Bill of Complaint), Santa Anna, California.
4. Mrs. Eloise K. Culp (Named as Mrs. Elloise or Elouise Bates in the Bill of Complaint), Long Beach, California.
5. Glen Perkins, Yorbalinda, California.

Children of a deceased half-brother, J. M. Kelleam, as follows:

1. Mrs. Ethel Riddler, Fort Smith, Arkansas.
2. Mrs. Dorothy Payne, nee Kelleam, Galveston, Texas.

Children of a deceased half-brother, W. S. Kelleam:

1. Clifford Kelleam or Clifford R. Kelleam, Los Angeles, California.
2. Mrs. Kathleen Leiter, nee Kelleam, Los Angeles, California.

Children of Mrs. Kate Hall, nee Kelleam, deceased half-sister:

1. W. L. (Leggette) Hall, Little Rock, Arkansas.

[fol. 79] 2. Mrs. H. H. Bradley (Marguerite or Margarite Bradley, nee Hall), Alhambra, California.

3. Lamar Hall, Waldron, Arkansas.
4. Mary Kate Hall, Alhambra, California.
5. Kelleam Hall.

Mrs. Clyde Bates, nee Kelleam, half-sister, Fayetteville, Arkansas.

Mrs. Fannie Bates, nee Kelleam, half-sister, Fayetteville, Arkansas.

Mrs. Nell Southard, nee Kelleam, full sister, Blanchard, Oklahoma.

E. A. Kelleam, full brother, Sells, Arizona.

Children of Dr. R. T. Kelleam, a deceased half-brother:

1. Dr. Fannin Kelleam (F. Q. Kelleam), Amarillo, Texas.
2. Francis Kelleam, Oklahoma City, Oklahoma.
3. Jimmie Kelleam, (Shown as Mrs. Jimmie Kelleam) in Bill of Complaint), Oklahoma City, Oklahoma.
4. Robert Kelleam, Texas.

The Court finds that none of the heirs of Leggette D. Kelleam, deceased, were named as heirs in the petition for the appointment of administrator, save and except E. A. Kelleam and Nell Southard, full brother and sister of the deceased. The Court further finds that knowing of the existence of other heirs the said E. A. Kelleam and Nell Southard fraudulently omitted from said petition the other heirs of the deceased Leggette D. Kelleam, and gave no notice as required by law as to the other heirs of Leggette D. Kelleam, deceased, and that the facts that there were other heirs were fraudulently concealed from the Court by E. A. Kelleam and Nell Southard, petitioners.

The Court further finds that E. A. Kelleam and Nell Southard perpetrated a fraud upon the County Court of Creek County, in that they represented in the petition for appointment of E. A. Kelleam as administrator of the estate of Leggette D. Kelleam, deceased, that E. A. Kelleam was a resident of Creek County, Oklahoma, when at that time he was and has ever since been a resident of Sells, Arizona, as shown by the amended petition for approval of final account introduced in evidence in this cause. And that [fol. 80] E. A. Kelleam failed to appoint a service agent in Oklahoma pursuant to the Oklahoma statutes.

II

The Court finds that thereafter on the 13th day of August, 1936, the County Court within and for Creek County entered an Order appointing E. A. Kelleam as administrator of the estate of Leggette D. Kelleam, deceased, upon said petition, conditioned upon his making, executing and filing an administrator's bond in the sum of $12,000.00; and, that thereafter the said E. A. Kelleam as Principal and the plaintiff herein, Maryland Casualty Company of Baltimore, Maryland, a corporation as Surety, made, executed and filed in said County Court as Administrator's bond in the sum of $12,000.00, wherein and whereby the said Maryland Casualty Company

became Surety upon said bond and wherein the bond provided as follows:

"Now if the above bounden principal shall faithfully execute the duties of said trust as aforesaid obligated, according to law, then this obligation is to be void; otherwise to remain in full force and effect."

That said bond was duly approved by the County Court of Creek County, Oklahoma, and Letters of Administration issued whereby the said E. A. Kelleam as Administrator entered upon the discharge of his duties of office as such.

III

That thereafter the said administrator E. A. Kelleam presented and filed in the Court of Creek County, Oklahoma, a joint inventory and appraisement wherein certain goods, chattels, rights, credits and real estate belonging to the said Leggette D. Kelleam, deceased, were listed, as shown by the inventory introduced in evidence in this cause and to which reference is made, and also, while the said E. A. Kelleam was administrator of the estate of Leggette D. Kelleam, he received certain cash items and other personal property as shown by his final report filed in the estate of Leggette D. Kelleam, deceased, which final report is in evidence in this cause and to which reference is made. The Court also finds that certain of the assets are in the possession and under the control of a receiver appointed herein as shown by the inventory of J. M. Scott, receiver appointed by this Court in the above captioned cause.

[fol. 81]

IV

That thereafter the said administrator presented and filed in the County Court of Creek County, Oklahoma, his final account and petition for determination of heirship for distribution and for his discharge as administrator wherein the real estate and personalty and assets listed in said inventory, together with funds received subsequent to his appointment as receiver were likewise listed. And in said petition for determination of heirship and distribution the said E. A. Kelleam asserted that he and Nell Southard were sole heirs of Leggette D. Kelleam, deceased, being brother and sister respectively, and he prayed that the balance of said estate, after debts of decedent were paid,

including all property, real and personal therein, be distributed between him and the said Nell Southard.

V

That thereafter the said Administrator filed in said County Court of Creek County in said cause and amended petition for approval of said final account and to have decreed the determination of heirship and distribution of said estate wherein the said E. A. Kelleam and Nell Southard fraudulently and falsely stated and represented to the County Court of Creek County, Oklahoma, that the said E. A. Kelleam and Nell Southard were the sole and only heirs of Leggette D. Kelleam, deceased, being brother and sister respectively of said decedent; and asserting that, however, when Leggette D. Kelleam departed this life he left surviving him the following brothers and sisters of the half blood; they being paternal half brothers and sisters, together with the following children of the paternal half-brother- and sisters, to-wit:

(1) Mrs. Clyde Bates nee Kelleam, half-sister.

(2) Mrs. Fannie Bates nee Kelleam, half-sister.

(3) Mary Perkins, nee Kelleam, deceased, was a half-sister who died in the year of 1932 leaving surviving her the following children, who survive: J. K. Perkins, Glen Perkins, Mrs. Fannie Bates, Bessie Mathews and Mrs. Eloise (Elouise) Culp.

(4) J. M. Kelleam was a half-brother of the deceased and died about 1903 leaving surviving him the following children who still survive: Mrs. Ethel Riddler and Mrs. Dorothy Kelleam Payne.

[fol. 82] (5) W. S. Kelleam was a half-brother of the deceased who died in the year 1908 leaving surviving him the following children who still survive: Clifford Kelleam and Kathleen Kelleam.

(6) Mrs. Katherine Hall was a half-sister of the deceased. She died in the year 1918 leaving surviving her the following children who still survive: W. L. Hall, Lamar Hall, Marguerite Bradley nee Hall, Kelleam Hall, Mary Kate Hall.

(7) R. T. Kelleam was a half-brother of the deceased who died at a date unknown to the said petitioners in said

amended petition but prior to the death of the deceased L. D. Kelleam, and the said R. T. Kelleam left surviving him the following children who now survive: F. Q. (Dr. Fannie) Kelleam, Francis Kelleam, Robert Kelleam and Jimmie Kelleam, a girl.

VI

That in said amended petition the said E. A. Kelleam and Nell Southard fraudulently represented that all of the property owned by the said Leggette D. Kelleam at the time of his death was an ancestral estate coming to him from his mother, one Mary Ayers Kelleam, and in said petition the said E. A. Kelleam and Nell Southard fraudulently and falsely represented to the Court that all property owned by the deceased, Leggette D. Kelleam, was purchased for him by the mother of the deceased during her lifetime and as an advancement to the said Leggette D. Kelleam in lieu of a portion of his share of her estate.

VII

The Court further finds that the representations in the amended petition were fraudulent in that the greater portion of the assets of the deceased, Leggette D. Kelleam, were acquired by the said Leggette D. Kelleam after the death of his mother and that she died in 1928.

The Court further finds that the defendants E. A. Kelleam and Nell Southard, as a part and parcel of their plan to defraud the half blood heirs of Leggette D. Kelleam, deceased, consummated a settlement with Mrs. Fannie Bates, nee Kelleam, surviving paternal half sister of Leggette D. Kelleam, deceased, and Francis Richardson, James Russell Bates and Robert Bates, children of Mrs. Klyde Bates, nee Kelleam, deceased, and Joe Bates, the surviving husband of Mrs. Klyde Bates, nee Kelleam, deceased, the said Mrs. [fol. 83] Klyde Bates, nee Kelleam, being a paternal half-sister of Leggette D. Kelleam, deceased. That in said settlement Mrs. Fannie Bates, and the heirs of Mrs. Klyde Bates received the sum of $4,000.00 in cash in exchange for their agreement not to appear in the County Court of Creek County until said decree became final, and for their agreement to refrain from contesting any order or decree of distribution granting all of the estate of Leggette D. Kel-

leam, deceased, to E. A. Kelleam and Nell Southard, all of which agreement appears in evidence in this cause.

VIII

The Court further finds that said amended petition for approval of the final account, determination of heirship, and distribution of the estate was set for hearing without any notice being given to any of the half-brothers and half sisters, heirs of Leggette D. Kelleam, and that the only attempted notice was a notice by publication, and that thereafter on the day and date appointed for said hearing, the County Court entered its judgment order and decreeing, finding and determining that said estate of Leggette D. Kelleam, deceased, was an ancestral estate and ordering distribution thereof to the E. A. Kelleam and Nell Southard whom the Court, upon said fraudulent representations, found to be the sole and only heirs of Leggette D. Kelleam and excluded from inheritance all of the half-sisters and descendents of the deceased half-brothers and sisters for the reason that the property of which the said Leggette D. Kelleam died seized was a maternal ancestral estate.

The Court finds said order was procured by fraud and was contrary to the laws of descent and distribution, and was void and invalid as to said half blood heirs.

The Court finds that thereafter, more than thirty days from the entry of the Decree of Distribution, the defendants and cross-petitioners herein instituted and filed in the County Court of Creek County a proceeding to vacate and set aside said Decree of Distribution and that the County Court of Creek County entered its decree, denying the petition of the defendants and cross-petitioners to vacate said final decree and that from said Order denying the petition of defendants and cross-petitioners, said defendants and cross-petitioners prosecuted an appeal to the District Court of Creek County, Oklahoma, where said appeal is now pending.

[fol. 84] IX

The Court finds further that after the decree of the County Court of Creek County was rendered, the defendant E. A. Kelleam undertook to and did make a purported conveyance to his son Joe Kelleam, one of the defendants herein, of a portion of said property and that the defendant

Nell Southard attempted to and did make a purported conveyance of the real property which she had purportedly received in said Decree of Distribution to her son, J. R. Southard, Jr. That these conveyances were not attempted to be made until after the defendants and cross-petitioners herein had filed their petition to vacate said final decree of distribution, and that said conveyances were made without consideration and were fraudulently made with full knowledge of grantors and grantees of the right of the defendants and cross-petitioners and that said conveyances are, therefore, void.

X

The Court further finds that the said E. A. Kelleam and Nell Southard were attempting to divest themselves of any share they had received from the estate of Leggette D. Kelleam, deceased, in order that the defendants and cross-petitioners herein could not recover any right, title or interest which said defendants and cross-petitioners might have in said property so distributed.

XI

The Court finds that the remaining assets of the estate of Leggette D. Kelleam now in the hands of E. A. Kelleam and Nell Southard are in danger of being dissipated and will not be available to satisfy any judgment, order or decree awarding said property to the defendants and cross-petitioners; and, that therefore, the plaintiff Maryland Casualty Company of Baltimore, Maryland, Surety on the Administrator's bond of E. A. Kelleam will become liable to said defendants and cross-petitioners for the failure of E. A. Kelleam, Administrator to perform his duties as such Administrator as required by law. That, therefore, the said plaintiff herein is entitled to have the property of Leggette D. Kelleam, deceased, now in the hands of E. A. Kelleam, Nell Southard, Joe E. Kelleam, and J. R. Southard, Jr., held intact and preserved to await the final order of judgment on an accounting between the defendants E. A. Kelleam and Nell Southard, Joe E. Kelleam, and J. R. [fol. 85] Southard, Jr., upon the one hand and the defendants and cross-petitioners in this action upon the other, which said property is now in the possession and under the control of J. M. Scott, receiver appointed in the above captioned cause.

XII

The Court further finds that the value of the property in controversy is in excess of the sum of $3,000.00.

XIII

The Court further finds that there is diversity of citizenship between the plaintiff, Maryland Casualty Company of Baltimore, Maryland, and the defendants, and defendants and cross-petitioners herein, and that this Court has jurisdiction of the parties and the subject matter in this action.

F. E. Kennamer, Judge.

CONCLUSIONS OF LAW

I

An administrator of an estate who fraudulently procures an order of the county court wherein the estate is pending, distributing the assets of the estate to himself, a full brother of the deceased, and to a full sister of the deceased, fraudulently concealing from the court the existence of half-sisters and children of deceased half-brothers and sisters to whom no notice was given of the petition for appointment of the full brother as administrator or any other notice, renders himself and the sureties on his administrator's bond liable to such half-sisters and children of deceased half-brothers and sisters for their distributive share of the estate.

II

Kindred of the half-blood inherit equal with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance. And where the evidence and uncontradicted record shows that an order of distribution in an administration of an intestate's estate was made contrary to such rule, the decree excluding half-brother's and sister's descendants is invalid as to such [fol. 86] half-blood kin, and they are entitled to their distributive share of the decedent's estate.

III

An estate of a decedent who died intestate, which was acquired principally through investments by the deceased's intestate or was acquired by purchase from funds given the decedent by decedent's mother, after her death, is not an ancestral estate.

IV

Where one dies intestate, unmarried, without issue, leaving only a brother and sister, two half-sisters, and children of deceased half-brothers and sisters, and seized of an estate that is not an ancestral estate, said estate goes in equal shares to his brothers and sisters, half sisters, and to the children of deceased half-brothers and sisters by right of representation, and a brother and sister of the decedent who fraudulently obtain title to the estate of the deceased through an invalid decree of distribution, hold said estate in trust for the heirs of the decedent fraudulently omitted from the decree of distribution of said estate.

V

A final order of distribution of a county court distributing an estate to a brother and sister of a deceased, to the exclusion of half-sisters and children of deceased half-brothers and sisters of the decedent when the decedent's estate is not an ancestral estate is invalid, and the administrator of the estate, the brother of the deceased, is liable on his administrator's bond to the children of the half-brothers and half-sisters of the deceased for their distributive share of the decedent's estate and must account to the excluded heirs, and the surety on the administrator's bond is entitled to have what property is found in the possession of the brother and sister or in the possession of grantees to whom such property was fraudulently conveyed, held by a receiver appointed by this Court to await the result of such an accounting.

VI

This court in the exercise of its equity powers, may deprive a party of the benefit of a judgment or decree fraudulently obtained in a state court.

[fol. 87]

VII

This Court finds that as a matter of law, the conveyances attempted to be made by E. A. Kelleam and Nell Southard

of portions of the estate of Leggette D. Kelleam were fraudulent conveyances without consideration, and that the grantee had constructive knowledge that these conveyances were fraudulent and were executed in an attempt to place the estate of Leggette D. Kelleam beyond the reach of the remaining heirs of Leggette D. Kelleam, and therefore void.

VIII

The Court further finds as a matter of law that plaintiff, Maryland Casualty Company, surety on the administrator's bond of E. A. Kelleam, is entitled to relief in that the property now in the hands of the receiver in this court should be continued to be impounded, conserved and preserved and impressed with an equitable lien in favor of the Maryland Casualty Company and the defendants and cross petitioners herein, said lien covering all of said property impounded equal to a 5/9 share of all of the estate of Leggette D. Kelleam. And that said receivership should be continued until defendants E. A. Kelleam and Nell Southard account to the defendants and cross petitioners for their distributive portion of the estate of Leggette D. Kelleam, deceased.

IX

A surety on the bond of an administrator who has fraudulently distributed an estate to himself and another as full brother and sister of the intestate is entitled to be exonerated by having assets remaining in the hands of the wrongful distributees held in trust and a lien created for the defrauded heirs entitled to a distributive share in the estate who were wrongfully excluded by a fraudulently obtained decree of distribution.

X

An administrator of an estate who fraudulently distributes the decedents estate to himself and another as heirs of the decedent to the exclusion of other rightful heirs to perform his duties faithfully as such administrator and renders himself and his bondsmen liable to the defrauded heirs.

XI

A United States District Court has jurisdiction and venue [fol. 88] of an Action by a surety, a non-resident of the state where the action is commenced to obtain exoneration

on an administrator's bond executed by it where the administrator has wrongfully distributed certain property, real and personal, to himself and another, a brother and sister of a decedent, to the exclusion of other heirs. Such wrongful distribution is invalid and creates a lien in favor of the defrauded heirs that may be enforced by surety where the property sought to be subjected to the lien is within the court's jurisdiction and the parties to the action are non-residents of the district wherein the action is brought and may be constructively summoned, or are residents thereof and served personally with summons in the district or state where the action is brought.

F. E. Kennamer, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DECREE—Filed September 26, 1939

This cause came on for trial pursuant to regular setting June 21st 1939. Plaintiff appeared by its duly authorized representative, and by its attorneys, W. E. Green, J. C. Farmer and Robert J. Woolsey. The defendants E. A. Kelleam, Nell Southard, R. J. Southard, Jr., and Joe E. Kelleam appeared by their attorney of record, Glenn O. Young, and all other defendants and cross-petitioners appeared by Heber Finch, R. A. Young Jr., and Pliny S. Frye, their attorneys.

All parties, in open court, announced ready for trial, and the Court ordered same to proceed to trial. Plaintiff introduced its evidence and rested, and the cross-petitioning defendants introduced their evidence and rested. Whereupon the defendants E. A. Kelleam, Nell Southard, R. J. Southard Jr., and Joe E. Kelleam interposed a demurrer to the evidence and motion for directed verdict in their favor, which said demurrer and motion were taken under advisement, and the Court directed said defendants to proceed with their evidence. At which time and in open court said defendants E. A. Kelleam, Nell Southard, R. J. Southard, Jr., and Joe E. Kelleam announced that they would stand upon their demurrer and motion for judgment and offered no evidence.

Whereupon, the Court took the entire cause under advise-
[fol. 89] ment, and now on this 30th day of August 1939, upon consideration of all the evidence and briefs submitted by counsel, decrees:

The demurrer and motion for judgment of the defendants E. A. Kelleam, Nell Southard and R. J. Southard, Jr., and Joe E. Kelleam are hereby overruled and denied and exceptions allowed each of said defendants. The requested findings of fact and conclusions of law by said foregoing defendants are refused and denied and exceptions saved, the Court having made its findings of fact and conclusions of law herein.

II

It Is Further Ordered, Adjudged and Decreed that the Maryland Casualty Company, plaintiff in this action, is liable and bound to the extent of the penalty of its bond, to-wit; Twelve Thousand ($12,000.00) Dollars for the faithful performance by E. A. Kelleam of his duties as Administrator of the estate of Leggette D. Kelleam, deceased, and is entitled to exoneration from this liability by having the property in the hands of the Receiver in this action, to-wit:

Lot 18, Blk. 5, Broadway Addn., Drumright, Okla.
Lot 11, Blk. 1, Drumright Addn., Drumright, Okla.
Lot 7, Blk. 2, Belle Vern Addn., Oklahoma City, Okla.
Lot 8, Blk. 7, Belle Vern Addn., Oklahoma City, Okla.
Lot 29, Blk. 7, College Hill Addn., Oklahoma City, Okla.
Lot 30, Blk. 7, College Hill Addn., Oklahoma City, Okla.
7/16ths Inst. Sam Vance lease; SW¼ SW¼ Sec. 6-17-7 Creek County, Arkansas.
1/32 Overriding royalty interest, Sam Vance lease, SW¼ SW¼ Sec. 6-18-7 Creek County, Oklahoma,

applied to the satisfaction of the interest of the cross-petitioners herein as such interests will be hereinafter decreed, and that it have credit on its obligations to the extent of all such property so applied to the satisfaction of that interest.

III

It Is Further Ordered, Adjudged and Decreed that the determination of heirship of the County Court of Creek

County, Oklahoma finding that the property both real and personal of Leggette D. Kelleam, deceased, was ancestral is void; and it is further adjudged and decreed that the Order and decree of the County Court of Creek County, [fol. 90] Oklahoma, purporting to distribute the estate of Leggette D. Kelleam, deceased, to E. A. Kelleam and Nell Southard is invalid, and that the cross-petitioners in this action be and they are hereby decreed to be the owners of an undivided 5/9ths interest to the estate of Leggette D. Kelleam, dec., and that the interest of the cross-petitioners to the said estate are as follows;

An undivided one-ninths interest to the children of the deceased half-sister, Mary Perkins, nee Kelleam, share and share alike as follows;

1. J. K. Perkins, Milwaukee, Wis., 1/45th interest.

2. Mrs. Fannie Bates, nee Perkins, Yorbalinda, Calif., 1/45th interest.

3. Mrs. Bess K. Mathis (named Mrs. Bessie Bates in the Bill of Complaint) Santa Anna, Calif., 1/45th int.

4. Mrs. Eloise K. Culp (Named Mrs. Elloise or Elouise Bates in the Bill of Complaint), Long Beach, Calif., 1/45th interest.

5. Glen Perkins, Yorbalinda, Calif., 1/45th interest.

An undivided one-ninth interest to the children of the deceased half-brother J. M. Kelleam, share and share alike as follows;

1. Mrs. Ethel Riddler, Fort Smith, Ark., 1/18th interest.

2. Mrs. Dorothy Payne, nee Kelleam, Galveston, Texas, 1/18th interest.

An undivided one-ninth interest to the children of the deceased half-brother W. S. Kelleam, share and share alike as follows;

1. Clifford Kelleam or Clifford R. Kelleam, Los Angeles, California, 1/18 interest.

2. Mrs. Kathleen Leit, or nee Kelleam, Los Angeles, California, 1/18th interest.

An undivided one-ninth interest to the children of the deceased half-sister, Mrs. Kate Hall, nee Kelleam, share and share alike as follows;

1. W. L. (Leggette) Hall, Little Rock, Arkansas, 1/45th interest.

2. Mrs. H. H. Bradley (Marguerite or Margarite Bradley, nee Hall) Alhambra, California, 1/45th interest.

3. Lamar Hall, Waldron, Arkansas, 1/45th interest.

[fol. 91] 4. Mary Kate Hall, Alhambra, California, 1/45th interest.

5. Kelleam Hall, ——, 1/45th interest.

An undivided one-ninth interest to the children of the deceased half-brother, Dr. R. T. Kelleam, share and share alike as follows;

1. Dr. Fannin Kelleam (F. Q. Kelleam) Amarillo, Texas, 1/36th interest.

2. Francis Kelleam, Oklahoma City, Oklahoma, 1/36th interest.

3. Jimmie Kelleam (Shown as Mrs. Jimmie Kelleam in the Bill of Complaint), Oklahoma City, Oklahoma, 1/36th interest.

4. Robert Kelleam, ——, Texas, 1/36th interest.

and that the said cross-petitioners are decreed to have a lien upon all property above described in the hands of the Receiver herein to satisfy their interest therein.

IV

It Is Further Ordered, Adjudged and Decreed that the defendants E. A. Kelleam and Nell Southard obtainee the purported decree of distribution and determination of heirship from the County of Creek County, Oklahoma, through fraud and misrepresentation and that E. A. Kelleam, Administrator, failed to faithfully perform his duties as Administrator of the estate of Leggette D. Kelleam, dec., as required by the statutes of the State of Oklahoma.

V

It Is Further Ordered, Adjudged and Decreed that the defendants E. A. Kelleam and Nell Southard be and they are hereby ordered and directed to account to the cross-petitioners and deliver over to the said cross-petitioners an undivided five-ninths (5/9ths) of the estate of Leggette D. Kelleam, deceased, and that the cross-petitioners herein be decreed to and have a lien upon all the property in the hands of the Receiver herein to satisfy that judgment, and upon failure of said defendants E. A. Kelleam and Nell Southard, to account therefor and pay over to the cross-petitioners said sums or deliver said properties as may be due within 90 days that the lien so created on the property in the hands of the Receiver be foreclosed and said Receiver to sell same under the Order and direction of this Court to satisfy said lien.

[fol. 92]

VI

It Is Further Ordered, Adjudged and Decreed the attempted transfer of property, or any part of the property described herein by E. *E.* Kelleam and Nell Southard were fraudulently made for the purpose of concealing their ownership therein, and an attempt to prevent said property being reached by the cross-petitioning defendants herein, and that the grant*t*es in such conveyances, as a matter of law, took said property with notice of the defects therein.

VII

It Is Further Ordered, Adjudged and Decreed that plaintiff have and recover its costs herein laid out and expended.

VIII

To all of which E. A. Kelleam, as Administrator; E. A. Kelleam individually, Nell Southard, R. J. Southard, Jr., and Joe E. Kelleam and each of them object and except, and their exceptions are allowed.

(Signed) F. E. Kennamer, Judge.

Service of copy acknowledged:

W. E. Green, J. C. Farmer, Robert J. Woolsey, Attorneys for Maryland Casualty Co. Heber Finch, Attorney for Cross-Petitioners.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 25, 1939

Notice is hereby given that E. A. Kelleam, Nell Southard, R. J. Southard, Jr., and Joe E. Kelleam, and each of them, defendants in the foregoing action, hereby appeal to the Circuit Court of Appeals for the Tenth Circuit from the final decree entered herein and filed with the clerk September 26, 1939.

Glenn O. Young, Attorney for appellants E. A. Kelleam, Nell Southard, R. J. Southard, Jr., and Joe E. Kelleam.

[fol. 93] [File endorsement omitted.]

[Appeal bond in the sum of $250, with appellants as principals and Ophelia E. Kelleam and John M. Grady as sureties, was filed in the district court on November 25, 1939.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO DOCKET APPEAL—Filed December 27, 1938

Now on this 26th day of December, 1939, for good cause shown, appellants, E. A. Kelleam, Nell Southard, R. J. Southard Jr., and Joe E. Kelleam, are granted thirty days additional time, up to and including February 3, 1940, in which to prepare, file and settle the record on appeal and docket this cause in the Circuit Court of Appeals for the Tenth Circuit.

F. E. Kennamer, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

Summary of the Record, Evidence and Proceedings at the Trial—Filed December 28, 1939

STATEMENT OF PROCEEDINGS

This proceeding was instituted June 8, 1938, when complainant, Maryland Casualty Company, filed its Bill of Complaint, as disclosed by the record.

Chancery Subpoena Issued and Served upon Mrs. *Mrs.* Frances E. Kelleam

On June 8, 1938, on praecipe of the plaintiff, Chancery Subpoena was issued out of the clerk's office directed to Mrs. Frances Kelleam, Tulsa, Oklahoma; upon the same date said subpoena was duly served by the U. S. Marshal for the Northern District by delivering to her personally a true copy thereof; proof of said service was returned and filed with the clerk, June 14, 1938.

On June 18, 1938, cross-petitioners filed Separate Answer and Cross-Petition, as disclosed by the record.

One June 27, 1938, an order appointing J. M. Scott receiver was entered, which is in substance as follows:

Order Appointing Receiver

This order is dated June 23, 1938, appoints J. M. Scott re- [fol. 94] ceiver on the application of plaintiff, Maryland Casualty Company. Shows all defendants except E. A. Kelleam, Nell Southard, Joe Kelleam and J. R. Southard, Jr., appeared by Heber Finch, their attorney, and joined in the application for a receiver. Specifies the following property for which receiver is appointed:

Lot 18, Block 5, Broadway Addition and Lot 11, Block 1, Drumright Addition in Drumright, Creek County, Okla.

Lots 7 and 8, Block 2, Belle Vern Addition, and Lots 29 and 30, Block 7, College Hill Addn., Oklahoma City, Oklahoma County, Okla.

Undivided 7/16ths interest and 1/32nd overriding royalty interest in Sam Vance lease (SW SW Sec. 6-18N-7E), Creek County, Okla.

Four notes signed by Nell Southard or Nell Southard and J. R. Southard, two for $700.00; one for $4,000.00, and one for $700.00 (No other data regarding the same being specified).

And any and all other assets now in the possession of or under the control of the defendants E. A. or Joe Kelleam or Nell or R. J. Southard, Jr., which were assets distributed by order of final distribution of the County Court of Creek County in cause No. 4354, in the Matter of the Estate of Legette D. Kelleam, entered May 18, 1937, "and all other personal property and real estate of every kind and descrip-

tion remaining in the possession or under the control of said defendants, E. A. Kelleam and Nell Southard of every kind and description whatever."

Fixed bond of receiver at $5,000.00; directed receiver upon filing bond to proceed to take possession of said property, both real and personal, to operate said property as the same is now operated, employ and pay laborers, servants, agents, attorneys, purchase and pay for material and supplies needed, to prosecute and defend without further order of court any and all actions brought against said property or himself as receiver by the permission of this court; to execute necessary conveyances, division and transfer orders, assignment of oil and gas leases or any interest therein, collect rents, bonuses, dividends, royalties, rents, etc., derived from said properties, and to do whatever else may be need-
[fol. 95] ful and proper to maintain and preserve said property until the further order of this Court; to inventory and keep accounts, etc.

(Signed) F. E. Kennamer, Judge.

Filed: June 27, 1938.

Oath and bond of receiver were duly executed and filed June 27, 1938, and the receiver entered upon the discharge of his duties.

On the same date W. E. Green and J. C. Farmer were appointed attorneys for the receiver.

Chancery Subpoena Issued and Served Upon Nell Southard and J. R. Southard, Jr., both of Blanchard, Oklahoma

July 22, 1938, on praecipe of the plaintiff, Chancery Subpoena was issued out of the Clerk's office directed to Nell Southard and J. R. Southard, Jr., both of Blanchard, Okla., upon July 27, 1938 the same was served upon said defendants personally by the U. S. Marshal for the Eastern District of Oklahoma, and On Aug. 13, 1938, the return of service in due form was filed with the clerk.

On July 25, 1938, motion of plaintiff for order of service on defendants A. E. Kelleam and Joe E. Kelleam outside of the district was filed, as shown by the record.

An order, as shown by the record, was issued and served upon E. A. Kelleam and Joe Kelleam personally in the State of Arizona on August 23 and August 9, 1938, respectively.

No Publication Service

No service by publication on unknown heirs or claimants or non-residents or other constructive service was ever had or obtained.

On Sept. 3, 1938, defendants filed separate special appearances and motions to dismiss, which were overruled Jan. 6, 1939.

Defendants filed separate answer to the petitioner's bill on Jan. 25, 1939, and motion to strike cross-petition on the same date.

On May 4, 1939, the receiver filed an inventory, which appears in the record.

On June 2, 1939, motion to strike cross-petition was overruled.

[fol. 96] And on June 7, 1939, defendants filed separate answer to the cross-petition.

On June 21, 1939, the foregoing cause came on for hearing before the Honorable F. E. Kennamer, U. S. District Judge for the Northern District of Oklahoma, at Tulsa. The complainant, Maryland Casualty Company, appeared by Green & Farmer, its attorneys; the defendants E. A. Kelleam, Nell Southard, Joe E. Kelleam, and R. J. Southard, Jr., hereinafter referred to as the answering defendants, appeared specially by Glenn O. Young, of Sapulpa, Oklahoma, their attorney, and the cross-petitioning defendants, who will hereinafter be referred to as such, appeared by Feber Finch, of Sapulpa, Oklahoma, and R. A. Young, of Ft. Smith, Arkansas, their attorneys.

The Court: "I assume the burden of proof is on the Maryland Casualty Company?"

Mr. Green: "Yes, your Honor, I think we have to prove some of the allegations. Most of them are admitted, however, in the answer."

The Court: "All right."

Lee Snider, witness for the complainant, testified:

I am the Court Clerk of Creek County, Oklahoma and have charge of the court records in the estate of Legette D. Kelleam, deceased.

The Court: "Can't you gentlemen stipulate as to these records, what they are?

Mr. Glenn O. Young: I don't think there is any dispute as to the records.

Thereupon the answering defendants, appearing specially, object to introduction of any evidence on the ground that the court is without jurisdiction or venue of the cause of action, or the parties and the plaintiff's petition fails to state facts sufficient to constitute a cause of action.

The Court: "I will overrule the objection and allow an exception."

The following instruments, having been duly identified, were admitted in evidence: Petition for Letters of Administration, Order Appointing Administrator, Administrator's [fol. 97] Bond, Letters of Administration, Inventory and Appraisement, Final Account and Amended Final Account of Administrator, Order Approving Administrator's Final Account, Determining Heirship, and providing for distribution, all of which are attached to the Separate Answer and Cross-Petition of Mrs. Ethel Riddler and are a part of the record, which counsel admit were properly signed.

Petitioner further offered in evidence application of Mrs. Ethel Riddler, et al., to reopen the estate and to be declared heirs, a substantial copy of which is hereto attached and marked Exhibit 1 and an Amended Petition or application to reopen the estate and to be declared heirs, a substantial copy of which is hereto attached and marked Exhibit 2.

Mr. Glenn O. Young: "Mr. Green, may I inquire whether you offered in evidence the publication service that was had in the County Court."

Mr. Green: "No, I am not offering it. * * * Don't think it necessary to my prima facie case. * * * I don't deny there were notices issued."

The Court: "I will just let that be introduced as a part of your cross-examination of this witness, the publication notices."

Thereupon the following exhibits were presented in evidence:

EXHIBIT

1. Notice to creditors, issued out of the County Court of Creek County, to present claims, dated August 25, 1936, with

proof of publication showing the same published and posted as required by the statutes of the State of Oklahoma.

EXHIBIT

2. Notice of Settlement of Final Account and for Decree Determining Heirship and for Distribution, with proof of legal publication in The Democrat News, the notice with caption and endorsements omitted reading:

"The State of Oklahoma to the heirs and next kin and all persons interested in the estate of Legette W. Kelleam:

You, and each of you, will take notice that E. A. Kelleam, administrator of the estate of Legette D. Kelleam, has presented and filed in the County Court of Creek County, Oklahoma, his final account as such administrator, [fol. 98] together with his petition for the approval thereof, and for a decree determining heirship, and for an order of distribution pursuant thereto; that said matters have been set for hearing in the County Court room at the court house in Sapulpa, Creek County, Oklahoma, on the 25 day of March, 1937, at the hour of ten o'clock a. m. at which time and place all persons having or claiming an interest in said estate are notified to appear and show cause, if any they have, why said final account should not be approved and a decree determining heirship and for distribution entered conformable to the prayer of said petition.

Dated this the 3rd day of March, 1937.

George D. Willhite, County Judge." (Seal.)

EXHIBIT

3. Notice of Hearing of Final Account and for Distribution and Discharge upon Amended Petition, with proof of legal publication in the Sapulpa Herald, as follows (proof of Publication, not being denied, is omitted):

"Published in Sapulpa Herald April 29, May 6, 13, 1937.

In the County Court of Creek County, State of Oklahoma.

In the matter of the estate of Legette D. Kelleam, deceased. No. 4354.

Notice of Hearing of Final Account and for Distribution and Discharge, and upon Amended Petition for Approval of Final Account and for Distribution of Estate.

Notice is hereby given that E. A. Kelleam, administrator of the estate of Legette D. Kelleam, deceased, having filed

in this court his final account of the administration of said estate and motion for distribution of said estate and for final discharge of said administrator, and his amended petition for approval of final account and for distribution, the hearing on all of the same has been fixed by the judge of said court for the 18th day of May, 1937, at the hour of 10:00 o'clock a. m., at the court room of said court in the county courthouse at Sapulpa, in the county and state aforesaid, and all persons interested in said estate, including Nell Southard, nee Kelleam, Mrs. Klyde Bates, nee Kelleam, Mrs. Fannie Bates, nee Kelleam, J. K. Perkins, Mrs. Fannie Bates, Glenn Perkins, Bessie Matthews, Mrs. Elouise Culp, Mrs. Ethel Riddler, Mrs. Dorothy Kelleam Payne, [fol. 99] Clifford Kelleam, Kathleen Kelleam, Legette Hall, Lamar Hall, Marguerite Bradley, nee Hall, Kelleam Hall, Mary Kate Hall, F. Q. Kelleam, Francis Kelleam, Robert Kelleam, Jim Kelleam are notified then and there to appear and show cause, if any they have, why the said account should not be settled and allowed, and said estate distributed and the administrator discharged.

Dated this 29th day of April, 1937.

George D. Willhite, County Judge." (Seal.)

Complainant then offered in evidence the following:

EXHIBIT

Instrument No. 20745, from Home Bldg. & Loan Assn. to L. D. Kelleam, recorded in Book 274, at page 515 of the deed records of Creek County, Oklahoma, dated Oct. 29, 1932, conveying Lot 18, Block 5, Broadway Addn. to Drumright, said deed being in due form.

EXHIBIT

Instrument No. 23906, being a Quit Claim Deed from E. T. Finley to L. D. Kelleam, dated Oct. 21, 1935, recorded in Book 402 at page 41 of the deed records of Creek County, Okla., duly executed and conveying Lot 11 in Block 1, in Drumright Addition to the town of Drumright, and now in Drumright's Amended Addition to the City of Drumright.

EXHIBIT

Instrument No. 32352, a Warranty Deed from Nell K. Southard and R. J. Southard, her husband, to Maud Grady,

duly executed and dated Oct. 21, 1937, recorded in Book 448 at page 28 of the deed records of Creek County, Okla., conveying an undivided one-half interest in and to Lot 18, Block 5, Broadway Addition to Drumright, and Lot 11, Block 1, Drumright Addition to Drumright.

EXHIBIT

Instrument No. 32183, a Warranty Deed from E. A. Kelleam to Ophelia E. Kelleam, recorded in Book 448 at page 6 of the deed records of Creek County, Okla., dated Oct. 13, 1937, duly executed and conveying an undivided one-half interest in and to Lot 18, Block 5, Broadway Addition to Drumright, and Lot 11, Block 1, Drumright Addition to Drumright.

Defendants objected to the introduction of the last two deeds upon the ground that Ophelia Kelleam and Maud [fol. 100] Grady were not parties defendant; that title to property conveyed to them could not be adjudicated in the pending action, therefore, the deeds were immaterial. Complainant stated that the only purpose was to show they were trying to dispose of this property and get it away, out of their possession; and these deeds will show that was done after the application to reopen the estate on the grounds of fraud, that was the only purpose. Objection was overruled and exception saved.

Mr. Glenn O. Young then inquired whether the record might show in waiving identity of proof defendants did not in any manner waive any other defenses.

The Court: "All right."

Cross-Petitioners then offered in evidence certified transcripts of Probate proceedings in the County Court of McClain County showing that Mary A. Kelleam, mother of L. D. Kelleam, died intestate, a resident of McClain County, Oklahoma, on Dec. 4, 1928; that L. D. Kelleam was by said court duly appointed administrator of her estate by consent of Nell Southard and E. A. Kelleam; that he duly qualified, gave notice to creditors, and otherwise properly administered said estate; that decedents's estate at death consisted of Lots 8, 9, 10, 11 and 12, Block 21 of the town of Blanchard, title to which by final decree of the court, entered

Sept. 2, 1929, became vested in L. D. Kelleam, E. A. Kelleam and Nell Southard in equal shares.

Defendants as part of the cross-examination of the witness offered in evidence "Order of Final Discharge and Releasing Administrator and Bond from Further Liability" entered in the County Court of Creek County which reads:

EXHIBIT

"Order of Final Discharge and Releasing Administrator and Bond from Further Liability

Now on this the 13 day of August, 1937, this cause coming on for final distribution and thereupon appears E. A. Kelleam, administrator of the estate of Legette D. Kelleam, deceased, and presents to the court evidence showing payment of inheritance and transfer taxes in this estate in the sum of $360.63, as fixed and determined by the Oklahoma Tax Commission, together with certificates duly executed by said Tax Commission, certifying to the fact of said payment and releasing and discharging the property of said [fol. 101] decedent Legette D. Kelleam from any and all liens by virtue of estate and inheritance taxes and thereupon said administrator further presents and shows to the court receipts showing distribution conformable to the order of the court of all property in his hands to the heirs lawfully entitled to participate in said distribution, as found and determined by the order, judgment, and decree of this court heretofore entered in this cause, and it appearing to the court that E. A. Kelleam has duly and regularly, and conformable to law, fully performed and discharged all duties and obligations imposed upon him by the laws of the State of Oklahoma, and has fully and faithfully accounted for all moneys and property coming into his hands and has distributed the same conformable to the orders, judgments, and decrees of this court and that there is no longer occasion for the continuance of his services as administrator of the said estate and he is entitled to be fully and finally discharged herein and to have his bond released from all other and further liability.

It Is, Therefore, the Order, Judgment and Decree of the Court that the said E. A. Kelleam, administrator of the

estate of Legette D. Kelleam, be and he is hereby finally discharged as administrator of the estate of Legette D. Kelleam and he and his bond are hereby released and discharged from all other and further liability by virtue of the appointment of said E. A. Kelleam as administrator of the estate of Legette D. Kelleam and it is the further order of the court that this cause be and the same is hereby terminated and closed.

(Signed) George D. Willhite, County Judge."

Defendants offered in evidence Petition and Amended Petition to Reopen Cause, filed in the County Court by the cross-petitioners. (This is the same as plaintiff's Exhibit No. 1 & 2, supra.) The citation issued to E. A. Kelleam and Mrs. Nell Southard; a "Special Appearance and Motion to Quash of Maryland Casualty Company," filed in the County Court on Nov. 16, 1937, in the same cause, wherein the Maryland Casualty Company alleged in substance: "That the alleged and denominated petition to reopen and the service purported to have been had thereon, is wholly insufficient to clothe this court with any jurisdic- [fol. 102] tion over this movant * * *." A "Special Appearance and Motion to Quash by E. A. Kelleam," filed therein Jan. 3, 1938; an Order overruling motion of E. A. Kelleam and Nell Southard to quash, entered in the County Court Aug. 24, 1938; a demurrer of E. A. Kelleam and Nell Southard, filed Aug. 25, 1938, in said cause, and an order of dismissal therein, which, omitting caption and endorsements, reads:

Exhibit

"Journal Entry of Judgment

Now on this the 15 day of September, 1938, this cause coming on for hearing in due course on the demurrer of E. A. Kelleam and Nell Southard, and said demurrants appearing by Glenn O. Young and A. L. O'Bannen, their attorneys, and petitioners herein appearing by Heber Finch, their attorney, and the court, having heard argument of counsel and having considered said demurrer, and being duly advised in the premises, finds that said demurrer is well taken and should be sustained.

It Is, Therefore, the Order, Judgment, and Decree of the Court that the demurrer of E. A. Kelleam and Nell Southard be and the same is hereby sustained and this proceeding dismissed. To which action of the court petitioners, by Heber Finch, their attorney, in open court give notice of their intention to appeal.

(Signed) George D. Willhite, County Judge.
(Seal.)"

A statutory Notice of Appeal and Bond, showing cross-petitioners duly appealed to the District Court of Creek County from the order entered, was also offered in evidence by defendants.

Defendants further tendered in evidence copies of pleadings filed by part of the cross-petitioners in another and different proceeding in the District Court of Creek County.

The Court. "What was that case about?"

Mr. Young: "That is this same case that was filed in the District Court of Creek County before this suit was instituted and which is still pending there."

The Court: "Who filed this suit down there?"

Mr. Young: "Those same defendants."

[fol. 103] Mr. Green: "No, the cross-petitioners in this case filed an original action down there, and at this time we object to the introduction of this case. It does not tend to prove or disprove any issue in this case."

The Court: "I will let it go in the record. I don't think it is either."

The record in this cause not being material to any issue involved in this appeal is not abstracted.

P. A. Sellers, for the complainant, testified: That he lived in Drumright, Oklahoma, where he was cashier of the Citizens Bank. He identified the stipulation between E. A. Kelleam and Nell Southard and Mrs. Fannie Bates, et al., which was introduced in evidence (Copy is annexed to cross-petition.) The witness testified this instrument was brought to the bank and left with an escrow deposit of $4,000.00. The witness identified the signatures to the stipulation.

The Court: "What do you want with this contract, what purpose?"

Mr. Green: "The purpose is to show the probable right of these petitioning cross-petitioners in this case to recover * * * showing the possible danger of our loss on this bond."

Mr. Glenn O. Young: "We object * * * the ground * * * It is incompetent, irrelevant and immaterial. If it does anything it exonerates them on the bond. That is what they say they want."

The Court: "I will let the contract be introduced in evidence." (Exception was saved.) This contract appears as an exhibit to the cross-petition in the record at p. 39.

The witness further testified over objection that about thirty days after the deposit of the $4,000.00 and on June 18 Luster Cook and he made one cashier's check or draft to these people at Little Rock and then one to Cook for $500.00; "that disbursed the $4,000.00." The money "went to the second parties in the contract and not to Dr. Kelleam or Mrs. Southard."

Mr. Finch: "Your Honor, the cross-petitioners desire this to be considered a part of their evidence."

[fol. 104] The Court: "I understand you adopt all of the petitioner's testimony unless it is otherwise noted."

Mr. Young: "We would like an objection then to any testimony in behalf of the alleged cross-petitioners in this case upon the ground and for the reason that the cross-petition fails to set forth a cause of action over which this court has jurisdiction, or venue, and upon the further ground that there is a prior action pending in the County Court of Creek County, Oklahoma, and in the District Court of Creek County, instituted by th-se same cross-petitioners, which is still pending." The objection was overruled and exception allowed.

Luster Cook, for the complainant, testified: I am not personally acquainted with E. A. Kelleam but saw him in the court room one day. I know of the estate of Leggette D. Kelleam. I was local counsel for Pearson & Pearson, a firm of attorneys at Fayetteville. We represented the same clients, who were parties to the settlement contract introduced in evidence in this case. I had something to do with negotiating that contract and received on behalf of my

clients the sum of $4,000.00 from the Citizens State Bank of Drumright, which I presumed was put up in escrow under the contract.

J. C. THOMAS, for complainant, testified: (In substance) I am claim manager for the Maryland Casualty Company, living in Tulsa. My duties are to investigate claims for this district. I received and made investigation of a claim reported to me under the bond of E. A. Kelleam as administrator of the Estate of Leggette D. Kelleam. I wrote to Dr. Kelleam on several occasions while he was in Sells, Arizona, and afterwards saw him personally. I don't recall the exact date, but it was shortly after this action was first started. That is when they brought suit to reopen the case in Creek County, in the spring of 1938. I saw him at Blanchard, Oklahoma, which is the home of his sister, Mrs. Nell Southard. I discussed the attempted reopening of the estate in Creek County with him. (At this point an objection to this testimony by defendants was interposed, overruled and exception saved.) Most of our conversation was whether or not Dr. Kelleam was going to come back here and defend this law suit. As I recall the Maryland Cas- [fol. 105] ualty Company had been served with summons. I was trying to get in touch with Dr. Kelleam and get him to defend this law suit. When I saw him he assured me he would be up here or have some attorney to represent him when the case came up in Creek County, but he didn't show up. I was present at the trial. (Defendants objected upon the ground that the court record was the proper evidence as to whether he appeared at the trial, which objection the court overruled.) The witness further testified that they did not appear and they had nobody there to represent them.

Mr. Green: "Did you make any request of him at that time, Mr. Thomas, as to whether he had placed this property in a position where it could be had to answer any judgment that might be rendered against him?"

Mr. Glenn O. Young: (By permission of the Court) Interrupted to ask: "Well, what was the occasion for this discussion about his putting property in your hands?"

A. "We wanted this property conserved in event the heirs that brought this action in Creek County were able to successfully come in and reopen the case."

Mr. Young: "And you attempted to get him to turn it over to you, didn't you?

A. "Not turn it over to me, but I wanted it put some place."

Mr. Young: "You wanted it turned over to your company?"

A. "That is right."

Mr. Young: "And that was part of your proceedings, to try and negotiate settlement of the difference before this suit was filed?"

A. "That is right."

At this point defendants moved to strike this testimony because part of an effort to compromise litigation, which was overruled.

On cross-examination by Mr. Glenn O. Young, the witness testified: It was the first case that was filed in which Dr. Kelleam did not show up either in person or by attorney. I don't remember the title of it but it was the first case in which these other heirs attempted to come in, in the County Court at Sapulpa. Dr. Kelleam didn't show up.

[fol. 106] Q. "He had an attorney representing him, who won the case for him, didn't he?"

A. "No, sir."

Q. "Are you familiar with the records just introduced?"

A. "Yes, sir. * * * I remember your statement to the judge that you were not appearing for Dr. Kelleam."

Q. "I am talking about the records of that proceeding in the County Court case."

A. "Yes, sir."

Q. "Have you any reason to suppose those County Court records are not correct?"

A. "I don't know whether they are correct or not."

Q. "How many times did you appear over there?"

A. "Every time it was set, and I would judge three or four times."

Q. "I believe you appeared the second time on behalf of Dr. Kelleam."

A. "I wasn't over there when the case was tried."

Q. "State if your company was hurt in any manner by the failure of Dr. Kelleam to appear before he had been served."

A. "No."

Q. "How was your company effected or injured by his failure to appear that first time?" (Over objection by Mr. Green, which the court overruled.)

A. "In substance, as I recall, there was no attorney to represent the Maryland Casualty Company when this case was set. Now under the indemnity agreement this doctor signed when he got that bond, he agreed to hire an attorney in event there was a claim filed under that bond, and if he didn't the Maryland Casualty Company would hire one and charge it back to him. * * * I didn't try to get Dr. Kelleam to hire Mr. Green. Naturally I told him under this agreement he was to put this property where it would be impressed with a lien of the Maryland Casualty Company for the expenses of that defense. I certainly did do that.

Q. "After Dr. Kelleam had said 'I am not going to hire the Maryland Casualty Company's attorney to represent me or put my property where it will i-demnify those lawyers for their expenses,' it is true Mr. *Mr.* Green went over in the County Court and attempted to get Dr. Kelleam into court and argued, helping Mr. Finch just as he is today, in [fol. 107] an effort to get this property where it could be tied up by court process?"

Mr. Green: "Your Honor, I objected to this inference, I am helping the defendants."

The Court: "Yes."

Q. "Mr. Green did appear in the County Court?"

A. "That is right, he was representing the Maryland Casualty Company."

Q. "And was arguing the case on the side of Mr. Finch and was advancing Mr. Finch's interest after Dr. Kelleam refused to hire him?"

Objection that the question was incompetent, irrelevant and immaterial and argumentative by the court sustained as argumentative.

By Mr. Young:

Q. "You say you did attempt to get the doctor to post this property so you could hire lawyers?"

A. "That is right."

Q. "And then he refused to do it?"

A. "I don't know whether he refused or not. He didn't do that."

Q. "It is true that after in the County Court instead of defending the doctor that Mr. Green was there attempting to help these cross-petitioners impose a liability upon the doctor?"

Mr. Green: "Wait a minute, that is an improper question."

The Court: "That is argumentative."

Q. "Which side did Mr. Green argue over there?"

A. "Mr. Green represented the Maryland Casualty Company."

Q. "Was it not pointed out to the court that Mr. Green was appearing on the wrong side if he was in good faith trying to defend his principal?"

The Court: "That is argumentative."

The witness testified that he knew generally about the second suit in the District Court styled Ethel Riddler et al. v. Dr. Kelleam, and the Maryland Casualty Company but couldn't say whether that suit was filed before the one on [fol. 108] trial. The witness didn't know how long after the occurrence in Creek County it was before his company made application for the appointment of a receiver. The conference at Blanchard was shortly after the first case was filed down there, the day it was set for trial. The proposal made to Dr. Kelleam at Blanchard with respect to this property was not definite. I just suggested that he put this property where it could be on hand in event they were successful in reopening the case. I didn't have any definite proposition, any certain place he should put it. He knew what I was talking about.

Q. "You then evidently knew where you wanted to put the property. Where did you want to put it?"

A. "I didn't have anybody designated."

Q. "If you were asking a man to put his property out of his hands into somebody else's hands, you don't think it important in whose hands you are going to put it?"

A. "It didn't get that far. I just suggested to Dr. Kelleam it might be well to keep this property so if these people were successful in reopening the estate it would be available to pay it off."

Q. "At that time you knew there had been an order of the County Court made, not once but twice, ordering a distribution of this property and discharging your company on its bond, didn't you?"

A. "I recall at least one."

Q. "You knew at least one final discharge and discharge of the bond had been entered, didn't you?"

A. "Yes, sir."

Q. "Had you any reason then to suppose the County Court of Creek County did not properly adjudicate this controversy before it? * * * I mean had you any reason to suppose there was going to be an attack *make* on this decree of distribution?"

A. "Only what the attorney for one of the parties had told me, Mr. Finch. My idea in going to see Dr. Kelleam was to try to work out an arrangement where the Maryland Casualty Company would be protected in event there was a claim.

Q. "Do you at this time say that Dr. Kelleam has failed to defend himself as principal and your company as surety on the bond?"

A. "Yes, sir. I certainly will say he has."

[fol. 109] Q. "What has he failed to do that he should have done to defend himself as principal and you as surety on his bond?"

A. "In the first place I wrote a letter to Dr. Kelleam by registered mail at Sells, Arizona, asking him if he would not defend this law suit. I didn't get an answer from him. I wrote him another; I didn't get an answer either. We sent him a telegram and he wired back and says he would defend the Maryland Casualty Company; that he would be present and defend this action. Prior to time of sending the telegram I wired an attorney in Arizona to drive 450 miles to interview him * * * he failed to tell this attorney * * * he would come up and defend this action. At the beginning he did not come up and successfully defend it. Told me he would have an attorney up there and failed to do it.

On redirect examination the witness testified (over objection by defendants): (In substance) Mr. Young was the attorney of record in this estate matter for Dr. Kelleam so I went to Mr. Young to find out whether he was going to represent Dr. Kelleam. He told me he hadn't been hired

and so far as he knew he was not going to appear at the hearing. The witness testified that at the time he talked to Dr. Kelleam conveyances had been made by him and his sister, Nell Southard, in an attempt to put the corpus of this estate in their children. On question by Mr. Young the witness stated that after the witness talked to Mr. Young, Mr. Young told him Mr. Speakman had something to do with the case but that Mr. Speakman told him he did not represent Dr. Kelleam at the hearing.

STREETER SPEAKMAN, witness for the complainant, testified: (In substance) I am a regularly practicing attorney in the State of Oklahoma and before this court. I have known Dr. E. A. Kelleam about three years. I represented him as administrator of the estate of Legette D. Kelleam. I was hired to close up the estate. This was after one final account had been filed. I was thereafter employed to represent him in other proceedings. This employment began at the time the proceeding was filed in the County Court to vacate the decree of distribution and a suit filed in the District Court. I represented him for some time in that matter, then dropped out of the litigation. While I was representing him I had negotiations with a representative of the Maryland Casualty Company, Mr. Green. We dis- [fol. 110] cussed the matters three or four times between the time application to reopen the decree was filed and the time I terminated my employment. I recall a long distance telephone call from my office to Dr. Kelleam at Blanchard.

(Over objection by defendants the witness further testified): (In substance) I talked to him from my office while Mr. Green was there. I don't recall who else was present. It is difficult to recall the substance of the conversation.

Question by Mr. Young: "Were you at that time trying to adjust the difference between the bond company and your client, Dr. Kelleam?"

A. "Yes, sir."

Thereupon defendants objected that testimony of negotiations to effect a settlement was immaterial, which was overruled.

The witness further testified: I got him over the telephone and arranged for him to meet Mr. Green at Blanchard and

discuss this proposition with him. Mr. Green was threatening to bring suit in the federal court for the purpose of appointing a receiver if he didn't made satisfactory arrangements to convince the bond company he was not going to dispose of this property. I attempted to make an arrangement whereby Mr. Green was to meet him and carry on these negotiations. I advised him to meet Mr. Green for the purpose of having such negotiations, and to try to work out a contract whereby he would satisfy the company to prevent litigation. (This evidence was received over defendants' objection.)

In general I advised him to place this property where it would be preserved. Of course the details were never agreed on and worked out." (Defendants moved to strike the advice as not binding and immaterial which was overruled.) The witness then identified a carbon copy of a letter set forth herein below, written by him to Dr. Kelleam and testified that the original was sent to Dr. Kelleam. The letter was received in evidence over objection that a letter of this character couldn't possibly change the legal rights of anybody, unnecessarily encumbered the record, and was a privileged communication between attorney and client.

[fol. 111] The letter follows:

EXHIBIT

"January 13, 1938.

Dr. E. A. Kelleam, Sells, Arizona:

Mr. Green, who represents the Maryland Casualty Company, just called me by phone. He advised me that unless something is done to satisfy his company within the next few days that he will file a bill in equity in the federal court, making you and all other parties defendant, asking for a receiver to tie up this property and draw the entire litigation into federal court.

I have not looked into the matter sufficiently to advise you whether or not this can be done successfully. However, there is no power that can prevent him from filing the suit in equity in the federal court. This would entail another attorney's fee on your part for some attorney to appear and represent you in federal court. No lawyer worthy of his hire would appear for you in that case for less than $500.00 or $1,000. Therefore, I feel that you should come

back here, get Mrs. Southard and meet Mr. Green in Tulsa and see if you cannot satisfy his company by indemnifying them or making some arrangements that will satisfy them in order to prevent the filing of this litigation.

Mr. Green guarantees me that your presence in Tulsa will not be divulged so that further service may be had on you or your sister and that he will not attempt to procure service on you in any suit he may have in mind in event satisfactory arrangements cannot be had at your conference. It is my advice to you to make this trip and try to avoid this threatened litigation and expense.

The thing that has raised their suspicion and caused them to take a hostile attitude toward you is the fact that you made a transfer of this property to your son. This, of course, was made without my advice or knowledge and if you had consulted me I would have advised you in the first instance to desist from such a procedure. However, [fol. 112] this is water that has gone over the mill and you will have to deal with the situation as it now exists.

Very truly yours, Speakman & Speakman, by Streeter Speakman.

SS:MB cc—Green & Farmer, Tulsa, Oklahoma."

On cross-examination the witness testified that at the time this letter was written Dr. Kelleam in the usual course of the probate proceedings had obtained an order discharging him from liability under his bond and had fully and finally been discharged as administrator of the estate; that he *he* did not know of any irregularity in that proceeding which would effect its validity; that the witness had tried to conduct it so that it would not be irregular but in conformity with the law. At the time the letter was written there was a pleading filed to vacate the judgment entered but it hadn't been acted upon.

I am not sure whether the bond company was a party or not but they took part, appearing at the setting of the case. I don't know whether it was immediately after my first telephone conversation to Dr. Kelleam or another one that someone communicated his whereabouts to Mr. Finch and service was had upon him in the proceeding instituted in the District Court but that did occur. Immediately after the telephone conversation in which I made some arrangement with him to meet Mr. Green they appeared down there that night and

served process on him in the proceeding instituted in the District Court of Creek County. Mr. Finch was not there to learn where Dr. Kelleam was. I did not notify Mr. Finch where Dr. Kelleam was. Mr. Green, Mr. Jones, of the firm of Johnson & Jones, and I were in my office at the time I called Dr. Kelleam. So far as I know, Mr. Jones did not notify Mr. Finch where Dr. Kelleam was. We were both representing Dr. Kelleam and doing our best to represent him. In fairness to the parties, I should let Mr. Young see the answer of Dr. Kelleam to this letter.

The witness, being temporarily excused, was later recalled and testified on direct examination by Mr. Finch:

I had nothing to do with the filing of the petition for letters of administration in the original proceedings in Creek [fol. 113] County. My employment began when it was sought to determine that this property was ancestral. The regular statutory notice was given. I think by publication only. I gave no notice except what the probate record shows. The heirs listed were the half brothers and sisters and offspring of half brothers and sisters as given by Dr. Kelleam, and his sister. She seemed to have a better recollection of it than he did. Together they got me up the names of them. I think maybe they had written around and inquired and found out.

On cross-examination by Mr. Young, the witness testified:

There was no effort to conceal from them the pendency of those proceedings in Creek County.

In regard to the letter I wrote Dr. Kelleam on Jan. 13, 1938, I received a reply to it. This the witness identified and it was offered in evidence. The letter reads:

EXHIBIT

"Sells, Ariz., Jan. 17, 1938.

Mr. Streeter Speakman, Sapulpa.

DEAR MR. SPEAKMAN:

Your letter in regard to Mr. Greene received.

I don't see why he should want to continue to harass me.

Also I have used up all of my leave and I do not see why he cannot submit his proposition in writing. I can pass upon it as well.

As you know Mr. Greene got service upon me before.

That is not the reason why I do not wish to come to Tulsa now. I made three trips back in 1937 and each one cost me about $100.00 each.

Please try to persuade him to leave us alone. If he will his company will not lose anything. If other suits are entered all will be eaten up in the courts.

Mr. Lebow a partner says the oil has dropped so that all of L. D.s interest is not worth over $3000.00.

Why Greene is hostile to me I don't know. It looks like he is helping Finch all he can.

I have asked Mrs. Southard to see you and get our deal all straightened out.

We have put our trust in you, you handled the other [fol. 114] suit and have better knowledge of the case than anyone else and we want you to go ahead.

Let Mr. Green submit his proposal in writing.

Yours truly, E. A. Kelleam, M.D.

Copy to Mrs. Southard.

Can't you bring the case in County Court to a verdict? Why won't Judge Willhite rule on it?"

The Court: "What is this trouble down there, Mr. Speakman about this being an ancestral or nonancestral estate?"

A. "I went into the matter thoroughly. As far as the facts are concerned, I think there is no difference. There may be a dispute as to the law. This deceased got the money which he invested, according to my investigation in this deal, he got the money from his mother. Had the checks, the bank records, showing them to me specifically got this money from his mother and I investigated it and concluded that it was a maternal ancestral estate which he left. The only question was a question of law as to whether or not he, having invested it, it lost its identity. That is just the long and short of it. I don't think he borrowed the money from his mother. I think she just gave it to him. I never found any evidence of a loan so far as I remember. I may be somewhat confused but that is my recollection of the situation. The matter was presented to the County Court of Creek County. We had present the cancelled checks and the bank records and all the data I was able to muster and introduced them in evidence."

In answer to a question by the court the witness testified:

"Dr. Kelleam was a full brother to the deceased and Mrs. Southard a full sister. They started a proceeding down there and left these half brothers and sisters entirely out of the picture. Word got to them somehow."

The Court: "Well, some of them found out and came down there?"

A. "Yes, sir. Some found out and made a protest and settled."

The Court: "Paid them off?"

A. "We made a settlement with them. We didn't pay a full share."

[fol. 115] The Court: "Compromised with those who came to Sapulpa with a view to appearing."

On redirect examination by Mr. R. A. Young, the witness testified: You (Mr. R. A. Young) I believe, Mr. Cook, and myself and a Mr. Pearson from Arkansas drew up the compromise settlement agreement. The reason for the settlement with the heirs at Fayetteville was that I thought it to the best interests of my clients to do so. Sure I had some doubts at the time whether this was an ancestral estate. I always have a doubt as to litigation.

Objection by Mr. Glenn O. Young: "We object to that as incompetent, irrelevant and immaterial. He had a right to compromise his clients law suit."

The Court: "Yes, but people haven't got a right to conceal from the court that there were other heirs living somewhere. They ought to be brought before the court and let the court have all the facts and determine it."

Glenn O. Young: "This compromise doesn't indicate concealment, it merely indicates a settlement."

The Court: "No, but the petition introduced in evidence for the appointment of an administrator designates this doctor and his sister as the only heirs, when it is known that there were other people that ought to have been listed and their post office addresses given, and they ought to have been brought before the court and given a chance to be heard upon the matter. That is no way to run a proceeding in probate, in my judgment."

Glenn O. Young: "Suppose this is the circumstance: That these parties contended they were the sole heirs?"

The Court: "That is all right. I say when you come in and file a petition to have an administrator appointed over an estate that is going to administer that estate, in fairness to the court he ought to list all of the kin folks that might be heirs. He cannot judge under the law whether they are heirs or not."

Mr. Young: "The Supreme Court of Oklahoma has passed on that identical matter and held there is no duty on an administrator to list others (than those he admits to be) heirs, any more than when a proceeding is filed in this court."

The Court: "I wouldn't want the title to property and [fol. 116] I wouldn't want as a good lawyer to pass an abstract where there had been any such proceedings without listing all the parties and get them into court. Understand I am not prejudging whether they were heirs or not but I say by that administration proceeding they ought to have been brought in."

Mr. Glenn O. Young: "When (we) get to the question of law, I will show your Honor first that the doctor listed all the persons in his application for administration that had any claim to administer, which is all he was required to do under the law; second, he is not required to list others than (those) whom he thinks are heirs. He is not obligated to list persons whom he claims are not heirs at law."

The Court: "As I understand it he was a full brother to the deceased?"

Mr. Young: "Yes, sir, that is true, and as such he was entitled to administer it."

The Court: "He also knew there were half brothers and half sisters?"

Mr. Young: "I think he did."

The Court: "Then he should have brought that to the attention of the court."

Mr. Young: "Whey should he have brought that to the attention of the court any more than other relatives?"

The Court: "He should have named everybody that stood in the relation of brother and sister."

On further examination by Mr. R. A. Young the witness testified the intent of this settlement with these heirs at Fayetteville was to dispose of their claims. They got their money when the decree became final.

Q. "If some other heir came in and successfully contested this thing, they wouldn't only contest it for themselves but necessarily and essentially for these people who were making the settlement. There was no agreement of secrecy. We made all parties that we complained of parties to this proceeding to distribute the estate, and the notice by publication, which is the process provided by the statute, was issued against them, specifically naming them. I made an investigation and determined that this money came from [fol. 117] the mother of Dr. Kelleam and Nell Southard. We went to their old home in Arkansas, checked up all the bank records there I could find, went out in the old barn, the secretary and myself, spent most of the afternoon checking thru a lot of old records that had been dumped out. All that were material were introduced in the County Court.

J. M. Scott, for the complainant, testified: That he lived at Mounds, Oklahoma, and had known Legette D. Kelleam all his life; that he had known Dr. E. A. Kelleam since July, 1936. Prior to the death of Legette D. Kelleam he had business relations with him concerning drilling a producing oil property in 6-18-7 in Creek County, known as the Vance-Kelleam lease. Legette Kelleam and I acquired a joint interest in the lease in 1930 or 1931. There were several interests involved. One man furnished the tools and drilling machine to drill the well. I furnished the casing, and L. D. Kelleam furnished the money for the development of the lease. Legette Kelleam owned an interest in this property at the date of his death. I continued that operation thru Dr. E. A. Kelleam as administrator. Regarding the value of the property, I would hate to set a value on it. I could value it according to the way I value my interest. I would say the part that is supposed to belong to the estate is worth $4,000.00. I think the Oklahoma City property worth $3,500.00 for the two properties. The property at Drumright $2,500.00 but that might be a little big. This property is all in my hands as receiver at this time. (Testimony as to the value of this property from this witness was received over objection because the witness was not qualified.) On cross-examination the witness testified:

Q. On what facts or circumstances do you base your statement as to the value of that property in Oklahoma City?

A. From the agent who managed the property for the estate.

Q. Just hearsay so far as you are concerned?

A. That is right. As a matter of fact I looked into it after I was appointed receiver.

Q. Where do you live?

A. I live at Mounds.

Q. Do you own property in Drumright?

A. No, sir.

[fol. 118] Q. Have you ever bought or sold property there?

A. No, sir. I base my statement in respect to Dr. Kelleam's property in Drumright upon investigation. Just a question of values by traders and dealers. I own other leases. I did own some adjoining or near this lease but sold those out. By virtue of the order appointing me receiver I took charge of the property in Oklahoma City, but took charge of no personal property, notes, bonds, or assets of that sort, and made no effort to do so. I took charge of no property outside of Creek County other than that in Oklahoma City. I was not present when I was appointed receiver but have been in custody and management of the oil leases in Creek County and the lots in Oklahoma City since. On redirect examination, the witness testified that he had not been able to find any personal property which he believed belonged to the estate; that he was actually operating the oil lease before he was appointed receiver.

Mrs. Ethel Riddler, for the complainant, testified: I live in Ft. Smith, Ark., and have known Legette D. Kelleam all his life. Ed (E. A.) Kelleam and Nell Kelleam (Southard) were his own brother and sister.

Mr. Young: "We object to all this evidence on the ground that the question is res judicata, having heretofore been determined by the probate court in Creek County, Oklahoma."

The Court: "I will let her answer."

A. Legette D. Kelleam left quite a few nieces and nephews.

Q. "Can you name them?"

A. "I will have to read them off. I can't remember their married names.

Mr. Young: "We object to her reading them."

The Court: "First, did he leave any other brothers and sisters besides Ed Kelleam and Mrs. Southard?"

A. He left half sisters, Mrs. Clyde Bates and Fannie Bates of Fayetteville, Ark.; my father Jim Kelleam, was a half brother, that is J. M. Kelleam. They had the same father. He was dead. He left my sister, Mrs. Dorothy Payne and Mrs. Ethel Riddler. Then he had a half sister, Mary Perkins. She is dead. She left surviving Mrs. Fannie [fol. 119] Bell Bates and Bess Perkins, I don't know her married name. I have a list of those collateral relatives.

Over objection by defendants, the witness testified from a list that Mrs. Bess K. Mathis is the daughter of Mary Perkins, his half sister. Mrs. Frances Bell Bates is another daughter of Mary Perkins; James K. Perkins, Glenn Perkins, and Mrs. Eloise Culp. He had a half brother, W. S. Kelleam, who is deceased. He has a daughter, Katherine. That deceased brother left the following children: Mrs. Kathleen Lighter and Clifford Kelleam. Mrs. Kate Kelleam Hale, deceased, a half sister, left five surviving children; Mr. H. L. Hall, Mr. W. L. Hall, Mrs. W. H. Bradley, Mary K. Hall, and Kelleam Hall. He had one deceased half brother, Dr. R. S. Kelleam who left four surviving children: Dr. F. Q. (Fannin) Kelleam, Miss Frances Kelleam, Miss Jim Kelleam, and Mr. Robert Kelleam. He left Mrs. Clyde Bates of Fayetteville and Mrs. Fannie Bates, who were half brothers and sisters. These are not parties to this law suit. They are the parties the settlement was had with. That is all the half brothers and sisters and their children. All of these named heirs, half brothers and sisters, live either in Oklahoma, Arkansas, or California.

On cross-examination by Mr. Glenn O. Young the witness testified:

Mr. R. A. Young prepared this list for me. He is one of the lawyers in the case and is related to the Kelleam family. I did not attend L. D. Kelleam's funeral. I had not seen him for three years before he died. He lived in Ft. Smith a good many years. The family had separated a good many years ago. We got along with Legette. We liked him. He came to see us the last time he was in Ft. Smith. I live in Ft. Smith.

The Court: Of course that would not be material. Lots of families scatter all over the country and very seldom see each other. Do you take any serious issue with them?

Mr. Young: I don't believe any two witnesses will agree as to who they are or where.

The witness continued: The heirs who live in California are scattered around in California. I could not tell you which ones are there and where. I can't give the post office address of any single one who is in California but I have [fol. 120] uncles who could. I know they are living. I hear of them thru my uncles. I heard from one about six months ago. There may be one or two I haven't heard from.

The Court: "It is not very material where each one of these nieces and nephews might live."

The witness continued: Mrs. Fannie Bates and Mrs. Clyde Bates were the only half-sisters living at the time Legette Kelleam died. It had been ten years before Legette Kelleam died since I had seen Dr. E. A. Kelleam. We were on good terms. He just wasn't in Ft. Smith. Mrs. Nell Southard never came to Ft. Smith. I had not heard from her in maybe ten or fifteen years. I don't know whether she had heard from any of these other relatives of Dr. Kelleam in ten years before Legette Kelleam died.

The Court: "I don't think that is important."

Mr. Glenn O. Young: "It is legally important to this extent: He had a right to presume they were not living."

The witness continued: Dr. Fannin Kelleam, I think, was a nephew or niece of Legette K. Kelleam that had visited Legette and Mrs. Southard in ten years before Legette died. That is just what I think, I didn't come with him. So far as I know none of them visited Mrs. Southard or Dr. Kelleam before Legette died.

Redirect examination by R. A. Young: My husband was a doctor in Ft. Smith where I have lived all my life. I saw Legette Kelleam whenever he came to Ft. Smith. I know where E. A. Kelleam lives. From the different heirs I heard at different times where the other heirs resided. I did not receive any notice from the Creek County Court in regard to that suit. None at all. My sister heard that the estate had been administered and told me. That was two years ago last October.

Francis Kelleam, witness for the complainant, testified: My home is in Sallisaw. I am working in Oklahoma City.

I knew Legette D. Kelleam. He was my father's half brother. My father's name was Dr. R. T. Kelleam. He lived in Sallisaw until he died in 1927. I have a brother in Amarillo, a brother in California and a sister in Oklahoma City. I have been in Oklahoma two years. I know [fol. 121] E. A. Kelleam very well. He is a half brother to my father.

JIM KELLEAM, witness for the complainant, testified: My home is in Sallisaw. I am in Oklahoma City at the present time. Am a sister of Miss Kelleam who just testified. My father was R. T. Kelleam who was a half brother to Legette D. Kelleam and to E. A. Kelleam. Mrs. Nell Southard was a half sister to my father. I have been in Oklahoma City for 21 months. My father died at Sallisaw in 1927. Frances and I have two brothers. Dr. Fannine Kelleam (one of them) is in Amarillo.

On cross-examination by Mr. Glenn O. Young, the witness testified:

I have never seen Mrs. Nell Southard. I do not know R. J. Southard, Jr. Did not attend L. D. Kelleam's funeral. I don't think my sister attended. It was two or three years before my father died that I last saw L. D. Kelleam. I don't remember the exact year. At the time I was living at Sallisaw and he at Drumright. I visited Dr. E. A. Kelleam in his home in 1926; that is the last time I ever saw him. I was living in Sallisaw. I did not write to him nor he to me. Our relations were friendly. The family has not been divided. We were just not trained together.

Redirect examination by Mr. Finch: My father and Dr. E. A. Kelleam at one time practiced medicine together in Sallisaw. There was no ill-will so far as I know. I have been in other states. I don't even know where E. A. Kelleam lives. I hadn't seen or heard from him for ten years or more. I knew he was working for the Indian Agency.

Questioned by Mr. Green, the witness further testified that about ten years ago she visited Dr. E. A. Kelleam who was then living at Garvin, Oklahoma.

(The plaintiff rests.)

By Mr. Finch: At this time the cross-petitioners introduce certified transcript of the record of the probate pro-

ceedings of the estate of Mary A. Kelleam, mother of the deceased, Legette D. Kelleam, to show the kind of property that was acquired by Legette D. Kelleam from the estate of [fol. 122] his mother. He got three lots in Blanchard worth $1,500.00. (The substance of these instruments has already been set forth.)

Mr. Finch: "I want to introduce certified deeds of property acquired by the deceased, Legette D. Kelleam, in Oklahoma City as cross-petitioners' Exhibit No. 2." These instruments received in evidence are substantially as follows:

EXHIBIT

General Warranty Deed from Tulsa Bldg. & Loan Assn. to Legette D. Kelleam, filed for record Aug. 18, 1933, recorded in book 439 at page 551, conveying Lots 7 and 8, Block 2, Bell Vern Addition to Oklahoma City, duly acknowledged, executed and recorded.

EXHIBIT

General Warranty Deed from Tulsa Bldg. & Loan Assn. to Legette D. Kelleam, recorded Aug. 18, 1933, in book 439 at page 550, dated Aug. 8, 1933, and conveying all of Lots 29 and 30, Block 7, College Hill Addition to the city of Oklahoma City, Oklahoma, duly executed, acknowledged and recorded.

Consideration in both instruments was $1.00 and other valuable consideration. Cross-petitioners also introduced in evidence various orders approving claims, allowing expenses, regarding taxes, etc., entered in the course of the administration of decedent L. D. Kelleam's estate, in the County Court of Creek County, which not being material to any question involved in this appeal are not transcribed.

LEE SNIDER, recalled for further examination by cross-petitioners, testified over objection by defendants: There is no record to show that E. A. Kelleam appointed a service agent in that probate proceeding.

Cross-petitioners rested.

Mr. Glenn O. Young to the court: "We are going to stand on a demurrer."

The Court: "You file a motion to dismiss the proceeding on the ground of the insufficiency of the complaint and evidence?"

Mr. Young: "That is true, we demur to the evidence and [fol. 123] move to dismiss on the grounds: first, that the court is without venue of the cause of action, these defendants not having been served in the Northern District; second, that the court is without jurisdiction over this cause of action, first because it is a proceeding in probate, and second because it has no jurisdiction over the parties or causes of action; third, because the matters have heretofore been fully adjudicated by the County Court of Creek County; fourth, because there is still pending in the County Court of Creek County an action previously instituted, involving the same matter, and fifth, because there is instituted and still pending a proceeding in the District Court of Creek County, a proceeding involving this same matter.

After discussion between the court and counsel as to why the proceeding on appeal to vacate the order of distribution has not been disposed of in the District Court of Creek County not relevant to any issue here, Mr. Young stated: "The last ground of my motion is upon the ground of diversity of citizenship. There is not the requisite diversity of citizenship; the case is not wholly between residents of different states, and we say generally that the cause should be dismissed because the evidence fails to establish any cause of action in favor of the bonding company, plaintiff, and against the defendants, nor a cause of action in favor of the cross-petitioning defendants and over which this court has jurisdiction."

Mr. Glenn O. Young for defendants submits request for findings of fact and conclusions of law without prejudice in view of the jurisdictional questions raised by motion.

The Court: "I will let you do that. Now I will let you gentlemen submit me briefs."

EXHIBIT 1

Estate of Legette D. Kelleam, Deceased. E. A. Kelleam, Administrator. In County Court. No. 4354

Petition to Reopen Case

Come now, Mrs. J. M. Kelleam, Ethel Riddler and Dorothy Payne and respectfully shows to the court, that Mrs.

J. M. Kelleam is the widow of J. M. Kelleam, deceased and Ethel Riddler and Dorothy Payne are children and only heirs of J. M. Kelleam. And that J. M. Kelleam was a [fol. 124] brother of Legette Kelleam, deceased, who died intestate and whose estate was administered by E. A. Kelleam, a non-resident of the State of Oklahoma and a resident of the State of Arizona. That E. A. Kelleam at all times here, knew that your petitioners herein, were heirs of the estate of Legette Kelleam and that in his petition for letters of Administration he failed to list your petitioners as heirs. That this was fraudulently done by him. Your petitioners further state, that they had no notice of the death of Legette Kelleam, his appointment as administrator of the estate, or that the estate had been closed, until after each and all of the acts had been done and that they never at any time directly or indirectly had any notice of any proceedings in this case, and have been denied their rights in and to the estate because of said fraud.

Your petitioners further state, that the appointment of an administrator was without notice and void, because of the non-residence of the Administrator and of the failure to give notice. That all the proceedings herein, from the appointment of administrator until final order of distribution was made, was void without legal force and effect for the reasons herein set out.

That at the time of the death of Legette Kelleam, he owned 7/16 interest in an oil and gas lease, being disribed as the SW¼-SW¼ of 6-18-7, being located in Creek County, Oklahoma. That practically all the balance of the estate consisted of personal property and money, which had been distributed by the order of this court. Your petitioners asks this court to declare lien of the above estate. That the Maryland Casualty Company be made a party to this action, it being the surety company who wrote the bond of E. A. Kelleam, the Administrator herein for the sum of $12,000.00.

Wherefor-, the petitioners pray that this case be reopened and an administrator be appointed an- that they be decreed there legal right in and to the above estate. And that the court set aside and hold for naught all orders made in this case.

Miles, Armstrong & Young, Heber Finch, Attorneys for Petitioners.

Received and Filed in County Court, Creek County, September 21, 1937. Lee Snider, Court Clerk, by Bess Ryan, Deputy.

[fol. 125] EXHIBIT 2

Estate of Legette D. Kelleam, Deceased. E. A. Kelleam, Administrator. In County Court. No. 4354.

Amended Petition

Comes now Mr-. J. M. Kelleam, Ethel Riddler, Dorothy Payne, first having obtained permission of the court and files this as their amended petition herein. Comes now, J. K. Perkins, a son of Mary Perkins, deceased, who was a sister of Legette D. Kelleam, and Leggette Hall and Lamar Hall, children of Kate Kelleam Hall who was a sister of Legette D. Kelleam and Frannie C. Kelleam, Francis Kelleam, Robert Kelleam, and Jim Kelleam, being all the children and heirs of R. T. Kelleam deceased, who was a brother of Legette D. Kelleam, each of the additional parties to this amended petition first having obtained permission of the court to become parties to this action and respectfully state, that they and each of them adopt each and every material allegation contained in the original petition filed herein on August 8, 1936, leaving the following heirs, whos- names and last known address as follows:

E. A. Kelleam, a brother—Sells, Arizona.
Nell Southard, a sister—Blanchard, Oklahoma.
Mrs. Fannie Bates, a sister—Fayetteville, Arkansas.
Mrs. Clyde Bates, a sister—Deceased, leaving the following named children and heirs, residents of Fayetteville, Ark. Robert Bates, Jim Bates, Mrs. Thomas Bates Richerson.

Mary Perkins, a sister—deceased, leaving the following named children and heirs. J. K. Perkins—Milwaukee, Wisconsin; Mrs. F. Bates—Long Beach, California; Glen Perkins—Long Beach, California; Bess Mathews—Santa Anna, California; Mrs. Eloise Kulp—Long Beach, California.
R. T. Kelleam, deceased.
J. M. Kelleam, deceased.
The heirs of both R. T. Kelleam and J. M. Kelleam are the petitioners herein Katherine Kelleam Hall—deceased,

a sister of Legette Kelleam, leaving the following heirs, Legette Hall—Little Rock, Arkansas; Lamar Hall—Waldrum, Arkansas; Margaret Bradley Kelleam—..... California; M. H. Hall—..... California.

W. S. Kelleam, deceased, a brother, leaving the following heirs. Clifford Kelleam—..... California.

[fol. 126] Your petitioners herein would respectfully show to the court that the original petition for letter of administration signed and verified by E. A. Kelleam and Nell Southard, which petition is specifically referred to in this amended petition, alleged and stated that the petitioners E. A. Kelleam and Nell Southard were the sole and only heirs of the deceased Legette Kelleam and that the place of residence of the petitioner, E. A. Kelleam was the Theral Hotel, of Drumright, Oklahoma, the persons herein set-out were also heirs of the deceased Legette D. Kelleam and these facts were known to the petitioners at the time they filed their petition for the appointment of an administrator and that the heirs herein mentioned were omitted in the said petition for the fraudulent purpose of preventing them and each of them from participating in the estate of the deceased E. A. Kelleam. That all of the said heirs were either brothers or sisters of the petitioners or the children of deceased brothers and sisters. That none of the named heirs herein, signed any agreement, or waiver, giving their consent to the appointment of E. A. Kelleam Administrator, a non-resident of the estate of Legette D. Kelleam. That the said appointment as administrator by E. A. Kelleam was obtained by fraud and misrepresentation on his part and Nell Southard.

Your petitioners further state, that they had no notice either actual, or constructive of the petition filed by E. A. Kelleam and Nell Southard for the purpose of appointing an administrator of the estate of Leggette Kelleam and no notice of hearing on the same, or any proceeding of any kind whatsoever had in this case prior to the time a final order of distribution was made in this case on — day of ——, 1937.

Your petitioners further state, that Francis Kelleam and Jim Kelleam, heirs and petitioners herein, were at all times from August 8, 1936, up to the present time citizens and residents of the state of Oklahoma and that this fact was at all times herein known to E. A. Kelleam and Nell Southard.

Your petitioners further state that E. A. Kelleam and Nell Southard the distributees under the final order of this court, which order was obtained by fraud and collusion as herein set out, received all the real estate and personal property of the deceased Legette D. Kelleam and since the original petition was filed herein to re-open this case. The said E. A. Kelleam and Nell Southard have fraudulently [fol. 127] attempted to dispose of all of the real estate obtained by them from the estate of Legette D. Kelleam by conveyances, which preported conveyances attempted to convey the property to different members of their respective families.

Your petitioners further state, that they at no time had any notice of the alleged administration of E. A. Kelleam and some of the petitioners herein, did not know of his death, until after the final order of distribution was made. That any order made in this case was obtained by fraud and was void and of no legal force or effect.

Your petitioners and each of them state, they have received no money, property, or other thing of value from the estate of Legette D. Kelleam, or from the administrator of the said estate of E. A. Kelleam, that none of the other heirs mentioned herein have received anything whatsoever from the estate of the deceased Legette D. Kelleam, with the exception of Mrs. Fannie Bates and Clyde Bates. Your petitioners have been informed, believes, and therefore charges, that some kind of a settlement between E. A. Kelleam, Nell Southard and these two heirs was perfected before the final order of distribution was made in this case.

Wherefore your petitioners pray, that legal notice be given to all the heirs mentioned herein, excepting those who have joined in this petition for the appointment of some fit and suitable person as administrator of this estate, that the Maryland Casualty Company, a corporation, a surety on the bond of E. A. Kelleam be given notice. That the court by proper order set the time and place for hearing on this petition for attorney's fees for the cost of this action and for all proper relief. That all orders made while E. A. Kelleam was the acting administrator of the estate of Legette Kelleam be vacated, set aside, and held for naught.

Miles, Armstrong and Young, by Heber Finch; Pliney Fry, by Heber Finch; Heber Finch, Attorneys for Petitioners.

State of Oklahoma,
County of Creek, ss:

Personally appeared before me Heber Finch, who states that he is the attorney for the petitioners herein, that he [fol. 128] had read the foregoing petition and the statements therein contained are true, that noen of the parties to this action are in Creek County at the present time.

Heber Finch.

Sworn and subscribed to this 16th day of November, 1937. Ruth Bayne, Notary Public. My commission expires, June 29, 1938.

Received and filed November 16, 1937, in County Court, Creek County. Lee Snider, Court Clerk, by Bess Ryan, Deputy.

Acknowledgment of Service

The undersigned attorneys for appellees hereby acknowledge service of copy of Designation of Record on Appeal, together with a copy of Exhibit A, thereto attached, containing narrative statement of the evidence and proceedings at the trial and portions of the record to be incorporated therein.

Dated this the 28 day of December, 1939.

Green & Farmer, Heber Finch, Attorneys for Appellees.

[File endorsement omitted.]

Exhibit "C"

In the County Court within and for Creek County, State of Oklahoma

No. 4354

In the Matter of the Estate of Legette D. Kelleam, Deceased

Petition for Approval of Final Account, for Decree Determining Heirship and for an Order of Distribution Pursuant Thereto

Comes now E. A. Kelleam, administrator of the estate of Legette D. Kelleam, and respectfully shows to the court:

That heretofore, to-wit, on or about August 8, 1936, Legette D. Kelleam departed this life; that upon the day and

date of his death he was an actual and bona fide resident of Creek County, Oklahoma, and had property and estate in said county; that upon the day and date of his death said decedent was unmarried; that he left him surviving neither wife, child or children, or issue of deceased child or [fol. 129] children, nor mother or father, nor brother or sister, nor issue of deceased brothers and sisters, except the following who are his sole and only heirs at law:

E. A. Kelleam, brother, age 54 years, whose address is Sells, Arizona, and Nell Southard, nee Kelleam, age 48 years, whose address is Blanchard, Oklahoma;

That search has been made among the personal property and effects of the said Legette D. Kelleam and in all places of every kind where any instrument of such nature might reasonably be expected to be found to ascertain whether said Legette D. Kelleam left a will and that none was found; that petitioner as the result of said search alleges that said decedent died intestate;

Petitioner avers that subsequent to the day and date of said Legette D. Kelleam on joint petition of the aforesaid Nell Southard, nee Kelleam, and your petitioner, the undersigned was, after due and proper notice to all persons interested in said estate, as required by law, designated and appointed administrator of the estate of said Legette D. Kelleam; that having duly qualified as such, as required by law, he entered into and took possession of the property of the said Legette D. Kelleam; that said property was duly inventoried and an inventory returned as provided by law; that a true and correct copy of said inventory is on file in this court and is by reference made part hereof as Exhibit A;

Petitioner says further that thereafter and on the 25th day of August, 1936, notice to creditors was duly and regularly given as evidenced by proof of notice duly filed herein and to which reference is hereby specifically made as Exhibits B and C; that thereafter all creditors, so far as known to your petitioner, did duly and regularly present their claims under oath, as required by law; that all just claims against said estate have been duly paid; that your petitioner has prepared and presents herewith as Exhibit D his Final Account wherein is correctly set forth all his doings as administrator of the estate of Legette D. Kelleam, including all items of property and money received and all claims paid, together with proper vouchers.

Petitioner further respectfully shows to the court that among property standing in the name of said Legette D. Kelleam was a certain undivided one-sixteenth interest in [fol. 130] an oil and gas lease belonging to and being the property of one E. E. Simpson but held by said Legette D. Kelleam pursuant to an agreement to secure payment of an undischarged balance due against said interest; that said indebtedness so due and owing by said E. E. Simpson has been fully and finally paid and discharged and that said E. E. Simpson and his assigns have requested and directed and do now request that your petitioner as administrator assigns, release, and transfer to —— —— said undivided one-sixteenth interest in said Sam Vance lease, that is to say:

An undivided one-sixteenth interest in an leasehold for oil and gas covering the Southwest Quarter (SW¼) of the Southwest Quarter (SW¼) of Section 6, Township 18 North, Range 7 East, Creek County, Okla.;

that save and except for securing payment of said indebtedness so due and owing, as hereinabove set forth, said undivided one-sixteenth interest in said leasehold estate was not a part or portion of the estate of Legette D. Kelleam;

Petitioner says further that as administrator he collected and accounted for property of value in the sum of $——; that he is entitled to compensation for services as administrator for the first thousand dollars at the rate of 5%, for all above that sum and not exceeding five thousand dollars at the rate of 4%, and all above that sum at the rate of 2½%, that is to say in the sum of $——, of which no part has been paid; that in the discharge of his duties as administrator, he did, by approval of court, retain and employ Glenn O. Young as his attorney, who claims reasonable compensation in like amount, that is to say: $——, of which $250.00 has heretofore been advanced and paid by order of court, leaving a balance due him of $——; that your administrator has further disbursed and paid out inheritance taxes in the sum of $——; or incurred liability for said sum, which should be directed paid and deducted from any moneys in his hands, as shown by the accompanying statements and vouchers.

Wherefore, premises considered, your petitioner respectfully prays the court that his Final Account so presented

and filed herein, together with this petition for distribution be set for hearing on a day certain, to be fixed by the court; that due and legal notice of the day and date thereof be given as provided by law; that upon final hearing herein [fol. 131] this court by its judgment, order and decree find E. A. Kelleam and Nell Southard, nee Kelleam, respectively the brother and sister of the deceased, Legette D. Kellear., to be his sole and only heirs at law and as such entitled each to an undivided one-half interest in all property, real, personal or mixed, of any kind and character and wheresoever situated of the said Legette D. Kelleam to be theirs absolutely free, clear, and discharged of all claims and demands of any other persons whomsoever subject to lawful claims and demands established, allowed and fully paid in this administration;

That your administrator be authorized, empowered, and directed to release and turn over to the assignee of E. E. Simpson an undivided one-sixteenth interest in the Sam Vance lease, as hereinabove set forth, and to sign or execute appropriate division orders directing payment to said assignee of oil, gas, or casing head gas accrued or accruing from said one-sixteenth interest.

That your administrator be allowed compensation to himself and fees to his attorney, as hereinabove set forth; that he be allowed costs accrued and accruing herein and unpaid as may be fixed and determined by the clerk of this court; that inheritance taxes, as stated hereinabove, be directed paid; that your administrator be ordered and directed thereupon to distribute the remaining property of every kind and character of Legette D. Kelleam in parts as follows:

To E. A. Kelleam, one-half;
To Nell Southard, nee Kelleam, one-half;

That upon making said disbursements and taking and presenting to this court proper receipts evidencing the same, your petitioner be finally discharged as administrator of the estate of Legette D. Kelleam from all further duties or responsibilities hereof of any kind or character; that his bond be ordered exonerated and discharged from any further liability and that he go hence without day.

(Signed) E. A. Kelleam, Administrator. Glenn O. Young, Atty. for Administrator.

Endorsed: Received and Filed in County Court, Creek County, March 3, 1937. Lee Snider, Court Clerk.

[fol. 132] EXHIBIT "D"

Final Account of Administrator

State of Oklahoma, Creek County, ss.

In the County Court of said County

To the Judge of said Court:

The undersigned, as the administrator of the estate of Legette D. Kelleam, deceased, respectfully submits the following as a full and correct account and report of his administration as such administrator from August 25, 1936, to the 20th day of March, 1937, which account exhibits not only the debts which have been paid, but also contains a statement of all the debts which have been presented and allowed during the period embraced in this account.

Administrator charges himself with the following, to-wit:

Date Month Day Year	Items Received	Amount
	(1) Lot 18, Blk. 5, Broadway Addn., Drumright, Okla.	1,100.00
	(2) Lot 11, Blk. 1, Drumright Addn., Drumright, Okla.	400.00
	(3) Lot 7, Blk. 2, Belle Vern Addn., Okla. City, Okla.	3,000.00
	(4) Lot 8, Blk. 2, Belle Vern Addn., Okla. City, Okla.	
	(5) Lot 29, Blk. 7, College Hill Addn., Okla. City	2,000.00
	(6) Lot 30, Blk. 7, College Hill Addn., Okla. City	
	(7) 100 shares Idaho Copper Co. #C3332 Par $1.00 share	none
	(8) 100 shares Idaho Copper Co. #C48653 Par $1.00 share	none
	(9) 100 shares Idaho Copper Co. #C48654 Par $1.00 share	none
	(10) 4 shares Crosley Radio Corp. Com. No. C01811	120.00
	(11) Acct. No. 1571 Savings Dept. Nat'l Bank of Tulsa	11.72
	(12) 2 shares Crosley Radio Corp. Com. #NY 3354	68.00

EXHIBIT "D"—Continued

[fol. 133]

Date Month Day Year	Items Received	Amount
	(13) 96 shares Tri-State Royalty Corp. No. F59, Tulsa	none
	(14) 300 shares Irwin Davis Petroleum, Okmulgee, Okla.	none
	(15) 1 Royalty Deed, undivided 10 acre int. in 640 acres described as Survey No. 1, Blk. B 1, Public School Land, Winkler County, Texas	none
	(15A) Mineral Deed, undivided .5 acre int. N½ NE¼ of Section 23, Twp. 12 North, Range 4 East	none
	(16) 10 shares No. 246 Capitol Oil & Gas Co., Wichita, Tex.	none
	(17) 10 shares No. 147, Okmulgee Oil & Leasing Co. Ft. Worth	none
	(18) 10 shares No. 146, Okmulgee Oil & Leasing Co. Ft. Worth	none
	(19) 28 shares No. 380 Sneed Petroleum Co., Tulsa	none
	(20) 528/600ths of a share No. T42 scrip certification (Sneed Petroleum Co.) capital stock	none
	(21) 100 shares Studebaker Corp. # NY 160490 Com.	none
	(22) 1 Oil & Gas Lease from John D. Hill & Nellie Hill, Morris Summy & Lucie Summy to L. D. Kelleam & F. E. Vensel on Lots 6, 8 & 12, Sec. 31, Twp. 19 N., Range 7 East	none
	(23) 50 shares Home State Voting Trust of Home State Ins. Co.	150.00
[fol. 134]		
	(24) One invoice of furniture in Drumright home $15.00 but less $7.00 for furniture sold qv.	8.00
	(25) One Ford Coupe, '36 model with radio, motor No. 18-2160494, actual cost $657.77	400.00
	(26) One liquidating agent's certificate # 282 for $115.41, half paid	11.50
	(27) One contract between L. D. Kelleam & Harry L. Charles & Virginia S. Charles, giving L. D. Kelleam ½ int. in royalty on book (Wichita, Kan.)	none
	(28) One cert. # 207, 10 shares in Home Bldg. & Loan Assn., Drumright, Okla. $358.00 less $67.50	290.50

EXHIBIT "D"—Continued

Date Month Day Year	Items Received	Amount
	(29) Two shares Standard Oil Co. (of Ind.) # 043930	74.00
	(30) 4/10ths of share, # 385, American State Bank, Charleston, Ark., par $25.00	10.00
	(31) Two shares, # 431 American State Bank, Charleston, Ark., par $25.00	50.00
	(32) 1/5th share No. S23012 Columbia Oil & Gas Corp.	none
	(33) 1/5th of a scrip share cert. Columbia Oil & Gas Corp.	none
	(34) 10 shares, # C03411, Columbia Oil & Gas Corp.	30.00
	(35) 5 shares # C01624, Okla. Gas & Elec. Co. par $100	500.00
	(36) 4 shares # 9767, Okla. Gas & Elec. Co. Par $100	400.00
[fol.135]		
	(37) Special overwriting agreement of M. A. Evans Co., Tulsa, Okla. Nos. 529, 530, 531, 532, 533, 534, 535, 536	none
	(38) 2 shares No. CN2727663 Columbia Gas & Elec. Corp. common, New York	42.00
	(39) One Oil & Gas Lease # 10,407 from W. M. Shumaker & Elizabeth Shumaker to C. G. Giblin & L. D. Kelleam	none
	(40) One No. 99381 C.S.U.B. 5% Gold Deb. due 1950	810.00
	(41) 7/16ths Int. Sam Vance Lease, SW¼ SW¼ 6-18-7	8,610.00
	(42) One cashier's ck. American State Bank, Charleston, Ark.	62.80
	(43) 1/32 overriding royalty int. Sam Vance lease	1,400.00
	(44) Nat'l. Aid Life Assn. Policy # M-6,803	1,000.00
	(45) Nat'l Aid Life Ins. Policy # 115532 (Policy $732.00 collected see following.)	
	(46) 300 shares common Wealth Southern	312.50 Inventoried at
	(47) Note of Nell Southard, Blancard, Okla. $ 700.00	none

EXHIBIT "D"—Continued

Date Month	Day	Year	Items Received		Amount
			(48) Note of R. J. & Nell Southard, Blancard, Okla.	4,000.00	none
			(49) Note of Grover Keely	100.00	none
			(50) Note of R. J. & Nell Southard	1,000.00	none
[fol.136]					
			(51) Note of Pleas Carter	25.00	none
			(52) Note of R. J. & Nell Southard	700.0	none
			(53) Note of J. N. & Lou Ann Pinkston	400.00	none
			(54) Acct. of E. E. Simpson	590.77	590.00
			(55) Acct. of I. Nadle (collected, see below)		
Aug.	7,	1936.	(56) Cash in bank		2,446.08
"	14,	"	(56A) Misc. receipts deposited		979.80
"	15,	"	(57) Newell House rent		12.50
"	28,	"	(58) Cash left by L. D. Kelleam at Morningside Hosp.		30.00
Sep.	21,	"	(59) Sale of furniture		7.00
"	21,	"	(60) Nadle check		667.20
"	21,	"	(61) Okla. Gas & Elec. dividend		15.75
"	3,	"	(62) Bells Sept. rent		20.00
"	22,	"	(63) Tidewater Oil Co. for Aug. oil runs		650.53
"	22,	"	(64) Hercules Life Ins. Co. (Same at Nat'l Aid Life #44 above)		763.52
"	,	"	(65) James E. Burke rent		58.33
"	15,	"	(66) Newell house rent for Sept.		12.52
"	15,	"	(67) Check from J. M. Scott for lease expense operations		67.37
Oct.		"	(68) Rent houses at Drumright		32.50
"	14,	"	(69) J. E. Burke rent at Okla. City		55.72
"	16,	"	(70) Tidewater Oil check for Sept.		475.22
Nov.		"	(71) Rent houses at Drumright		32.50
"	18,	"	(72) Tidewater Oil check for Oct.		467.87
Dec.	9,	"	(73) Dividend check Columbia O.G.&E. 40¢—Burke rent $13.35		13.75
"		"	(74) Rent houses at Drumright (less expenses)		14.50
[fol. 137]					
Dec.	16,	1936.	(75) Tidewater Oil check for Nov.		415.51
"	23,	"	(76) Okla. Gas & Elec. check $15.75—Columbia O&G $2.50		18.25
Jan.	2,	1937.	(77) H. B. & L. Div.		67.50
"		"	(78) Rent houses at Drumright		32.50
"	19,	"	(79) Tidewater Oil check for Dec.		409.38
"	17,	"	(80) B. T. Moore note		196.80
"	19,	"	(81) Crosley Radio $3.00—J. E. Burke $16.96 & O. G. & E. $2.00		21.96

EXHIBIT "D"—Continued

Date Month	Day	Year	Items Received	Amount
Feb.	2,	1937	(82) Rent houses at Drumright	32.50
"	10,	"	(83) J. E. Burke rent, Okla. City	44.97
"	17,	"	(84) Tidewater Oil check for Jan.	320.05
"	27,	"	(85) Rent at Drumright	20.00
Mar.	10,	"	(86) J. E. Burke	59.95
"	15,	"	(87) Tidewater Oil check for Feb.	341.88
			Total amount received	$30,208.22

Contra

Said administrator asks to be credited with the following payment to creditors of deceased, as per Vouchers herewith submitted:

Mo.	Da.	Yr.	Items Paid Out		Amount
Sep.	4,	1936	To Citizens Bank, Drumright, for one note	Ck. # 1	$ 3,115.00
"	4,	"	To H. B. Martin, Drumright, for doctor bill	" # 2	122.00
"	4,	"	To Dr. C. R. Swanker, dentist (services rendered decd.)	" # 3	12.00
"	4,	"	To Masonic Hospital at Cushing for hospitalization	" # 4	141.80
"	4,	"	To Miss Faye Wilbur for nursing deceased	" # 5	7.00
"	4,	"	To Joe Coppinger for barber services a/c deceased	" # 6	4.00

[fol. 138]

Mo.	Da.	Yr.	Items Paid Out		Amount
Sep.	4,	1936	To A. H. Foreman for carpenter work on garage	Ck. # 7	$ 18.00
"	11,	"	To E. A. Kelleam for bond $75.00 & court costs $15.00	" # 8	90.00
"	14,	"	To Stubblefield Funeral home for funeral services	" # 9	650.51
"	19,	"	To T. R. Carmichael for pumping	" #10	80.00
"	19,	"	To Jim Smith for services as night pumper	" #11	10.00
"	19,	"	To Oscar Barnes for services as night pumper	" #12	10.00
"	19,	"	To Otis Smith for 1 day's labor	" #13	3.00
"	19,	"	To Clifford Waynes for 3 days labor	" #14	9.00
"	19,	"	To Frank Jefferies for 2½ days labor	" #15	7.50
"	19,	"	To Magnolia Petroleum Co. for oil	" #16	15.81

EXHIBIT "D"—Continued

Mo.	Da.	Yr.	Items Paid Out			Amount
Sep.	19,	1936	To National Supply Co. for material	"	#17	5.45
"	19,	"	To Continental Supply Co. for material	"	#18	10.92
"	19,	"	To Eureka Tool Co. for supplies	"	#19	10.86
"	19,	"	To Mexia Planning Mill for lumber	"	#20	27.87
"	19,	"	To Fluid Packed Pump Co.	"	#21	54.08
"	19,	"	To Independent Iron & Metal Co.	"	#22	82.82
"	19,	"	To Wallman Battery Co.	"	#23	1.03
"	19,	"	To Ideal Machine Co.	"	#24	7.34
"	21,	"	To E. A. Kelleam for July lease operations to reimburse himself	"	#25	128.50
"	23,	"	To Long Bell Lumber Co. for material & labor on house	"	#26	16.11
"	27,	"	To Tennis-Griffith Motor Co. for car storage, gas & oil	"	#27	18.48

[fol. 139]

Sep.	26,	1936	To Club Cafe for meals which decedent owed	Ck.	#28	$ 12.05
"	26,	"	To W. D. Tharel for hotel service	"	#29	39.91
"	26,	"	To Pearl Howell for preparing grave	"	#30	8.50
"	26,	"	To Z. D. Howard Co. for auto repairs	"	#31	18.78
"	26,	"	To W. W. Jamison for services as bookkeeper	"	#32	17.50
Sep.	26,	1936	To Dr. R. E. Leatherock for medical services	Ck.	#33	10.00
"	26,	"	To J. M. Scott for bal. due on operations of oil wells	"	#34	119.37
Oct.	3,	"	To court clerk for costs	"	#35	10.00
"	13,	"	To J. M. Scott for Sept. lease operations.....	"	#36	115.58
"	29,	"	To Capitol Hill Monument Co. for stone to grave	"	#37	306.00
"	29,	"	To Dr. W. J. Neal for medical services	"	#38	200.00
Nov.	15,	"	To J. M. Scott for Oct. lease operations	"	#39	80.85
Dec.	11,	"	To Glenn O. Young as advancement on attorney's fees	"	#40	250.00
"	22,	"	To J. M. Scott for Nov. lease operations	"	#41	69.60

EXHIBIT "D"—Continued

Mo.	Da.	Yr.	Items Paid Out			Amount
Jan.	11,	1937.	To Citizens Bank of Drumright in payment ½ of Ed Young note, signed by L. D. Kelleam as surety	"	#42	250.00
"	15,	"	To Willis C. Strange, Treasurer, for paving tax and 1936 ad valorem tax on Lot 18, Blk. 5, Drumright	"	#43	62.36
"	24,	"	To J. M. Scott for Dec. lease operations	"	#44	76.28
Mar.	13,	"	To Collector Int. Rev., Okla. City (Income Tax)			13.35
"	19,	"	To J. M. Scott for Jan. operating expenses			60.06
[fol.140]						
Mar.	19,	1937	To J. M. Scott for Feb. operating expenses			$ 80.76
"	,	"	To administrator's fee as per statute		840.20	
"	,	"	To attorney's fees (Less $250.00)		840.20	
"	,	"	To inheritance taxes			
"	,	"	To accruing court costs and expenses			
			Total amount received:		$30,208.22	
			" " paid out:		8,140.48	
			Balance due			$22,067.74
			Inheritance tax costs due			

E. A. KELLEAM,
Administrator.

State of Oklahoma, Creek County, ss.

E. A. Kelleam, being duly sworn, on oath says, that he has read the foregoing account and report of his administration, as the administrator of the estate of Legette D. Kelleam, deceased, and knows the contents thereof, and that the same are true and correct according to the best of his information, knowledge, and belief.

E. A. Kelleam.

Subscribed and sworn to before me, this 23rd day of March, 1937. Della Mae Sconiers, Notary Public. (Seal.) My commission expires: Nov. 22, 1940.

Said administrator further reports that the debts and claims against said estate have all been paid, leaving the

above balance to be distributed between the parties lawfully entitled thereto, as follows:

To E. A. Kelleam, brother of deceased: $——.
To Nell Southard, sister of deceased: $——.

Said administrator now moves the Court that he be allowed to make distribution as above set forth, and take receipts therefor, and present the same to this court, and be discharged; all of which is respectfully submitted.

E. A. Kelleam, Administrator.

[fol. 141] Subscribed and sworn to before me, this 23rd day of March, 1937. Della Mae Sconiers, Notary Public. (Seal.) My commission expires: Nov. 22, 1940.

Endorsements: No. 4354 Amended and Supplemental Final Account. In the Matter of the Estate of Legette D. Kelleam, deceased. Leave granted to file this 24th day of March, 1937. George D. Willhite, County Judge. Received and Filed in County Court, Creek County, March 24, 1937. Lee Snider, by Bess Ryan, Deputy.

In the County Court Within and For Creek County, State of Oklahoma

In the Matter of the Estate of Legette D. Kelleam, Deceased. No. 4354

DEMURRER

And now come the defendants, E. A. Kelleam and Nell Southard and each of them severally and not waiving but expressly reserving the question of jurisdiction over this controversy by virtue of failure to issue and serve process as required by law, demurs generally and specially to the amended petition presented and filed herein and for grounds of demurrer respectfully states:

First, that this court has no jurisdiction over the person of these defendants.

Second, that this court has no jurisdiction over the subject matter of this action.

Third, that there is an absence of indispensible parties to this proceeding apparent upon the face of the record.

Fourth, that there is a misjoinder of parties apparent upon the face of the record.

Fifth, that the persons bringing or attempting to bring this pretended action are without legal capacity to sue, and this pretended action was not instituted by a duly authorized representative as required by law.

Sixth, that this suit is not instituted in the name of the real parties in interest.

Seventh, that said amended petition shows upon its face that any pretended cause of action is barred by limitations, [fol. 142] laches and delay, and that this proceeding was not timely instituted in the manner and form required by law.

Eighth, that said amended petition shows upon its face that the remedy of petitioners sought to be invoked herein is by appeal conformable to the appropriate sections of the code governing probate procedure, and that this court is without jurisdiction to grant the relief prayed.

Ninth, that said amended petition is so vague and indefinite, uncertain and contradictory in its terms as to be incomprehensible and is not prepared conformable to the provisions of the statutes of the State of Oklahoma, pleads conclusions of law and omits allegations necessary to constitute a cause of action in favor of petitioners and against these respondents.

Tenth, that said amended petition discloses on its face that it attempts to raise questions concerning the legality of sales of real estate from E. A. Kelleam and Nell Southard to unnamed persons not parties to this proceeding, and to determine title to said real estate over which controversy this court has no jurisdiction; and in this connection respondents aver there is another and different action pending in the District Court of Creek County, State of Oklahoma, to-wit, the case of Ethel Riddler et al., Plaintiffs, vs. E. A. Kelleam, et al., Defendants, No. 22,999 wherein petitioners seek to litigate the identical matters set forth herein; that having so invoked the jurisdiction of the District Court, petitioners are precluded from re-litigating the same matters in this action.

Eleventh, that said amended petition together with all intendments to be drawn therefrom fails to state facts sufficient to constitute cause of action in favor or petitioners or either of them and against these defendants or either of them.

Glenn O. Young, A. L. O'Bannon, Attorneys for Respondents.

Received and Filed In County Court, Creek County, August 25, 1938. Lee Snider, Court Clerk. By Bess Ryan, Deputy.

[Appellants' statement of points relied on, filed in the district court, is identical with the statement appearing at page 1, and therefore is not reprinted here.]

[fol. 143] IN UNITED STATES DISTRICT COURT

DESIGNATION OF RECORD ON APPEAL—Filed December 28, 1939

To the Honorable H. P. Warfield, Clerk, U. S. District Court for the Northern District of Oklahoma:

Conformable to Rule 75 of the rules governing civil procedure, adopted by the Supreme Court of the United States appellants E. A. Kelleam, J. R. Southard, Jr., Nell Southard, and Joe E. Kelleam designate the summary of portions of the record, proceedings and evidence hereto attached and made part hereof as Exhibit A to be contained in the record on appeal.

In addition to the matter included in Exhibit A, appellants further designate the following portion of the record for inclusion in the Transcript on Appeal, that is to say:

1. Bill of Complaint, filed June 8, 1938.

2. Separate Answer and Cross-Petition of Mrs. Ethel Riddler, et al., filed June 18, 1938, with exhibits.

3. Motion of Plaintiff for Order of Service on Defendant E. A. Kelleam and Joe E. Kelleam Outside of District and Order for Service Outside of District, and return of service thereon, filed Aug. 27, 1938.

4. Special Appearance and plea to the Jurisdiction of E. A. Kelleam, and Special Appearance and Motion to Dismiss of Joe E. Kelleam, J. R. Southard, Jr., and Nell Southard, filed Sept. 3, 1938.

5. Amendment to Bill of Complaint, filed Oct. 24, 1938.

6. Journal Entry overruling Special Appearance and Motion to Dismiss of Joe E. Kelleam, J. R. Southard, Jr. and Nell Southard, and Special Appearance and Plea to the Jurisdiction of E. A. Kelleam, filed Jan. 23, 1939.

7. Motion of E. A. Kelleam, Nell Southard, J. R. Southard, Jr. and Joe Kelleam to strike Cross-Petition, filed Jan. 25, 1939.

8. Separate Answer of defendant E. A. Kelleam to Bill of Complaint and Amendment thereto, filed Jan. 25, 1939.

9. Inventory of Receiver, filed May 4, 1939.

10. Separate Answer of defendants E. A. Kelleam, Mrs. Nell Southard, J. R. Southard, Jr. and Joe E. Kelleam to Cross-Petition, filed June 7, 1939.

[fol. 144] 11. Journal Entry Overruling Motion to Strike Cross-Petition, filed June 12, 1939.

12. Defendants' Request for Special Findings of Fact and Conclusions of Law, filed June 21, 1939.

13. Findings of Fact and Conclusions of Law, filed Sept. 26, 1939.

14. Decree, filed Sept. 26, 1939.

15. Notice of Appeal, filed Nov. 25, 1939.

16. Appeal Bond, filed Nov. 25, 1939.

17. Order Extending Time to Docket Appeal, filed Dec. 27, 1939.

There is also tendered for the use of opposing counsel two copies of the reporter's transcript of the evidence and proceedings of the trial, included in this designation, with true and correct copies of this designation for use of opposing counsel, and your office.

Glenn O. Young, Attorney for Appellants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AMENDMENT TO DESIGNATION OF RECORD—Filed January 15, 1940

Appellants for amendment to their Designation of Record on Appeal add thereto:

1. Statement of Points for Consideration on Appeal, filed December 28, 1939.

Glenn O. Young, Attorney for Appellants.

I hereby certify that a true and correct copy of the foregoing amendment was served upon defendants by mailing to their attorneys of record, Green & Farmer, Tulsa, Okla., and Heber Finch, Sapulpa, Okla., a true copy thereof, this the 13th day of Jan., 1940.

Glenn O. Young, Attorney for Appellants.

[File endorsement omitted.]

[fol. 145] IN UNITED STATES DISTRICT COURT

DESIGNATION OF PLAINTIFF, MARYLAND CASUALTY COMPANY OF BALTIMORE, MD., OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED—Filed January 5, 1940

Pursuant to Rule 75, of the rules of Civil Procedure, comes now the plaintiff, Maryland Casualty Company, and designates additional portions of the record, proceedings and evidence, to-wit:

1. Order allowing plaintiff to file amendment to Bill of Complaint.

2. Praecipe for chancery subpoena, filed 6-22-1938.

3. Separate Answer of defendant Joe E. Kelleam, filed January 25, 1939.

4. Separate Answer of J. R. Southard, Jr., filed 1-25-39.

5. Praecipe for chancery subpoena filed 6-8-1938.

6. Separate Answer of Nell Southard filed 1-25-1939.

7. Chancery subpoena served on J. R. Southard, Jr. and Nell Southard.

8. Chancery subpoena served on Mrs. Frances Kelleam.

9. Amendment to Answer and Plea in Abatement, filed Jan. 21st, 1939.

10. Order appointing Receiver.

11. Oath of Receiver.

12. Bond of Receiver.

13. Transcript of oral evidence.

14. All exhibits offered in evidence and mentioned in transcript, omitting duplication of exhibits in defendant's designation of record and omitting duplication of exhibits in the pleadings.

15. Plaintiff's fifth exhibit offered in evidence, being the final account of the Administrator in the estate of Legette D. Kelleam.

(This exhibit appears as an exhibit to defendants and cross-petitioner's Separate Answer and Cross-petition, but is incomplete.)

[fol. 146] Dated this the 5th day of January, 1940.

W. E. Green, J. C. Farmer, Robert J. Woolsey, Attorneys for Maryland Casualty Company, 714 National Bank of Tulsa Bldg., Tulsa, Okla.

Service on defendants by mailing copies to Glen O. Young, attorney for Appellants—Sapulpa, Okla.

Service on defendants and crosspetitioners by mailing copy to Heber Finch, attorney, Sapulpa, Okla., R. A. Young, Jr., attorney, Little Rock, Ark., Pliny S. Fry, attorney, Little Rock, Ark.

J. C. Farmer, one of the attorneys for Maryland Casualty Company, a corp.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AMENDMENT TO PLAINTIFF'S DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED—Filed January 18, 1940

Comes now the plaintiff, Maryland Casualty Company and amends its designation of additional portions of the

record, proceedings and evidence to be included in the record, to-wit; In lieu of designations 14 and 15 in the original designation hereto filed, the following;

14. Final account of Administrator in probate case #4354 Creek County, Oklahoma.

15. Petition for approval of final account in above case #4354.

16. Amended and supplemental final account in above case #4354.

17. Petition to reopen case, filed in above case #4354.

18. Amended petition filed in said case #4354.

19. Demurrer filed in said case #4354.

20. Journal Entry of Judgment in said case #4354.

[fols. 147-148] 21. Cross-petitioner's exhibit 2, two warranty deeds.

22. Plaintiff's exhibit #1—Stipulation of settlement.

23. Plaintiff's exhibit #2—Letter of Speakman & Speakman to E. A. Kelleam.

(Note: In the original designation all exhibits are requested and this amendment to the original designation omits exhibits that would merely encumber the record.)

Dated this 18th day of January, 1940.

W. E. Green, J. C. Farmer, Robert J. Woolsey, Atty. for Pltf., 714 Natl. Bk. of Tulsa Bldg., Tulsa, Okla.

Service on defendants by mailing copies to; Glen O. Young, attorney for appellants—Sapulpa, Okla., Heber Finch, attorney for defendants & crosspetitioners, Sapulpa, R. A. Young, Jr., Fort Smith, attorney for defendants & crosspetitioners, Pliny S. Fry, Wewoka, Okla., attorney for defendants & crosspetitioners.

Green & Farmer, By W. E. Green, 714 Natl. Bk. of Tulsa Bldg., Tulsa, Okla., Atty. for Pltf.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 149] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER OF SUBMISSION—April 22, 1940

This cause came on to be heard and was argued by counsel, Glenn O. Young, Esquire, appearing for appellants, Robert J. Woolsey, Esquire, and W. E. Green, Esquire, appearing for appellee Maryland Casualty Company, Heber Finch, Esquire, appearing for appellees Ethel Riddler et al.

Thereupon this cause was submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 2059. April Term, 1940

Glenn O. Young (A. L. O'Bannon was with him on the brief) for Appellants.

W. E. Green and Robert J. Woolsey (J. C. Farmer was with them on the brief) for Appellees Maryland Casualty Company; Heber Finch (R. A. Young, Jr., and Pliny Frye were with him on the brief) for Appellees Ethel Riddler, et al.

OPINION—June 17, 1940

Before Phillips, Bratton and Huxman, Circuit Judges

HUXMAN, Circuit Judge, delivered the opinion of the court.

On August 8, 1936, Leggette D. Kelleam died intestate, a resident of Creek County, Oklahoma. He was survived by E. A. Kelleam and Nell Southard, his brother and sister, and by Fannie Bates and Mrs. Klyde Bates, two half sisters, and by a number of children of prior deceased half brothers and half sisters. On August 25, 1936, E. A. Kelleam and Nell Southard petitioned the County Court of Creek County, Oklahoma, for the appointment of E. A. Kelleam as administrator of the estate of Leggette D. Kelleam, deceased, alleging that they were the sole and only surviving heirs. On the same day E. A. Kelleam was appointed adminis- [fol. 150] trator and duly qualified as such by executing a bond in the sum of $12,000, signed by the Maryland Casualty Company as surety. No notice of appointment was published. E. A. Kelleam thereupon took possession of the

estate and administered it. He filed his final account and petition for the determination of heirship and for a decree of distribution, again alleging that he and his sister were the sole and only heirs of the deceased.

Evidently, prior to the hearing of the petition for final account, Fannie Bates, a half sister, heard of the probate proceedings and contacted E. A. Kelleam and Nell Southard concerning the same. A contract was then executed by E. A. Kelleam and Nell Southard with Fannie Bates and the surviving husband and children of Mrs. Klyde Bates, now deceased, whereby Kelleam and Nell Southard agreed to deposit $4,000 in the bank, together with the contract, and agreed that this sum should be paid to them for any interest they claimed in the estate, providing none of the heirs of any of the other half brothers or half sisters of deceased came in and filed a claim, but that if, prior to final distribution, any party claiming to be interested in the estate should appear in the County Court and question the right of E. A. Kelleam and Nell Southard to the entire estate, they would be entitled to withdraw the $4,000 in escrow. The contract also provided that it would not constitute entering an appearance in the County Court of Creek County by Fannie Bates or the heirs of Mrs. Klyde Bates.

After the execution of this contract, E. A. Kelleam filed an amended petition for approval of his final account, and for a decree determining heirship and distribution of the estate. He now listed the one living half sister and the children of the deceased half brothers and half sisters, and for the first time claimed for himself and Nell Southard the entire estate as an ancestral estate. The amended petition for approval of the final account, determination of heirship and distribution of the estate, was set for hearing without notice being given to the half sister or any of the children of deceased half brothers or half sisters, other than by publication.

Thereafter, on the day appointed for the hearing, the County Court entered its judgment, order and decree, finding and determining that the estate of Leggette D. Kelleam, deceased, was an ancestral estate, and ordered distribution thereof to E. A. Kelleam and Nell Southard.

[fol. 151] On September 21, 1937, a petition to reopen the proceedings was filed and an amended petition was filed on December 28, 1937, by the children of the prior deceased half brothers and half sisters of Leggette D. Kelleam, de-

ceased, setting forth their relationship to deceased and stating that they had no notice of the proceedings; that the distribution of the estate was fraudulently and collusively obtained, and asking that the decree of the County Court be set aside. E. A. Kelleam and Nell Southard demurred to this petition, and on September 15, 1937, the *Court* Court sustained the demurrer. The petitioners then appealed to the District Court of Creek County, where their appeal is now pending.

After the decree of the County Court sustaining the demurrer to the petition to reopen the case was entered, E. A. Kelleam made a conveyance of some of the real estate which he had obtained from the estate to his son, Joe Kelleam, and Nell Southard made a like conveyance of the real estate which she had obtained from the estate to her son, J. R. Southard, Jr. The conveyances were made without consideration.

On June 8, 1938, The Maryland Casualty Company filed its bill of complaint in the United States District Court for the Northern District of Oklahoma, making the full blood heirs, as well as the half blood kinsmen of deceased, Leggette D. Kelleam, defendants, seeking exoneration on its bond, and asking that a receiver be appointed to preserve the decedent's property pending the outcome of the dispute between the heirs, and that the property be impressed with an equitable lien to satisfy and discharge any final judgment that might be obtained between the litigating parties. By cross petition the defendants who had been excluded from heirship by the decree of the County Court filed their answer and counter claim asserting their claim to an interest in the estate and joined in the application for the appointment of a receiver. June 27, 1938, J. M. Scott was appointed receiver of the property of the estate. E. A. Kelleam, Joe E. Kelleam, Nell Southard and J. R. Southard, Jr., all filed special pleas to the venue and the jurisdiction of the court, and upon such pleas being overruled, they moved to strike the cross petition for want of jurisdiction of the subject matter. The motion to strike was overruled and they thereupon filed their answer and plea in abatement and answer to the cross petition. Issues were joined, the cause was tried to the court, and findings of fact and conclusions of law were made by the court.

[fol. 152] The court found that the estate of Leggette D. Kelleam was not an ancestral estate; that the decree of the

court was obtained by fraud and was therefore void; that the half sister and the children of prior deceased half brothers and half sisters were heirs and entitled to share in the estate; that E. A. Kelleam and his surety were liable to the defrauded heirs; that the surety company was entitled to exoneration and to have the assets impressed with a trust: A decree in conformity with the conclusions of the court was entered, providing for an accounting; that if no accounting be rendered, that then the lien on the property in the hands of the receiver be foreclosed. From this decree an appeal has been taken.

Appellants assert: First, that the District Court was without jurisdiction for the following reasons:

(a) Because a diversity of citizenship was neither alleged nor established.

(b) Because residence in the Northern District was neither alleged nor established.

(c) Because the United States District Court has no jurisdiction in probate to review or set aside decrees of the County Court exercising probate jurisdiction, nor to determine heirship.

(d) Because the United States District Court is without authority to divest an administrator appointed by the County Court in probate of the decedent's estate or to direct such administrator in the discharge of his duties.

(e) Appointment of a receiver without notice, at the instance of a surety upon the bond of an administrator who has been twice exonerated, is beyond the jurisdiction of the United States District Court.

Second, that the evidence of appellees was insufficient to establish fraud or other grounds warranting vacation of the decree of the County Court.

The controversy as to the diversity of citizenship centers around the citizenship of the Kelleams and the Southards. The complaint alleges that E. A. Kelleam and Joe Kelleam are residents of Arizona; that Nell Southard and J. R. Southard, Jr., are residents of Oklahoma; and that all of [fol. 153] the remaining defendants are residents and citizens of Arkansas and Oklahoma.

Jurisdiction of the United States District Court between citizens is based on diversity of citizenship, and an allegation

that a party defendant is a resident of a state is not equivalent to an allegation of citizenship in that state. Such an allegation is insufficient to confer jurisdiction upon the District Court. Realty Holding Co. v. Donaldson, 268 U. S. 398, 45 S. Ct. 521, 69 L. Ed. 1014; Wolfe v. Insurance Co., 148 U. S. 389, 13 S. Ct. 602, 37 L. Ed. 493; Robertson v. Cease, 97 U. S. 646, 24 L. Ed. 1057.

The failure to properly allege diversity of citizenship between plaintiff and defendant will not, however, defeat the jurisdiction of the court if, as a matter of fact, such diversity exists. Halsted v. Buster, 119 U. S. 341, 7 S. Ct. 276, 30 L. Ed. 462; Continental Ins. Co. v. Rhoads, 119 U. S. 237, 7 S. Ct. 193, 30 L. Ed. 380; Howe v. Howe & Owen Ball Bearing Co., 8 Cir., 154 F. 820; Fidler v. Roberts, 7 Cir., 41 F. 2d 305.

Where a defective averment of diversity of citizenship is made in the bill of complaint, the whole record may be looked to for the purpose of curing such defect, and if the requisite citizenship is anywhere averred in the record, or facts are therein stated which in legal intendment constitute such allegations, that is sufficient. And where the court is satisfied, in the light of all the testimony, that the averment of residence is a designated state was intended to mean, and reasonably construed, must be interpreted as meaning that the party was a citizen of that state, it is sufficient. Sun Printing and Publishing Ass'n v. Edward, 194 U. S. 377, 24 S. Ct. 696, 48 L. Ed. 1027.

The record shows that in his petition filed in the County Court, E. A. Kelleam stated under oath that his address was Drumright, Oklahoma, and that Nell Southard was a resident of Blanchard, Oklahoma. Appellants E. A. Kelleam and Joe Kelleam in their answer admit that at the day and date of the institution of this action they were residents of Arizona, and appellants Nell Southard and J. R. Southard, Jr., in their answer admit that at the day and date of the institution of this action they were residents of the State of Oklahoma.

Proof that a person is a resident of a state is prima facie evidence that he is a citizen thereof, and shifts the burden of [fol. 154] showing that his domicile and citizenship is other than the place of his residence to him who alleges it. Mahon v. Somers, et al., cc. Ohio, 112 F. 174; Anderson v. Watt, 138 U. S. 694, 11 S. Ct. 449, 34 L. Ed. 1078; Desmore v. U. S., 93 U. S. 605, 23 L. Ed. 959.

Here appellants do not contend that facts exist which would establish that any of the defendants are citizens of the state of domicile of the surety company, nor do they contend that such is the fact. Their only complaint is that plaintiff in its complaint does not state that E. A. Kelleam, Joe Kelleam, Nell Southard and J. R. Southard, Jr., are citizens of the state in which they admit they reside. In the absence of any showing that they have ever resided in any other state, the finding of the court that diversity of citizenship exists is sustained.

This is an action to impress a trust on real and personal property with a fixed situs in the Northern and Western Districts of Oklahoma. Section 116, 28 U. S. C. A., provides that a local action involving property of a fixed character, lying partly in one district and partly in another, may be brought in the District Court of either district. Section 118, 28 U. S. C. A., provides for service of summons on absent defendants in suits to enforce liens. These are the applicable statutory provisions to an action such as we have here, and not Sections 111 and 112, 28 U. S. C. A., upon which appellants rely.

Appellants urge that the United States District Court has no jurisdiction in probate to pass upon decrees of the County Court exercising probate jurisdiction, nor to determine heirship, and that the United States District Court is without authority to divest an administrator, appointed by the County Court in probate, of the decedent's estate or to direct such administrator in the discharge of his duties. With this statement of principle we find no fault. Appellants rely largely on the case of Wells v. Helms, et al., 10 Cir., 105 F. 2d 402, to sustain their contention. In that case this court, speaking through Judge Phillips, said that an administrator appointed by a state court is an officer of that court and takes possession of decedent's property in obedience to the orders of the court; that his possession is the court's possession and cannot be disturbed by any other court, and that in such an action one claiming an interest in the estate could not seek a judgment against the administrator in his representative capacity.

[fol. 155] However, the court also said in that case that a distributee of an estate who is a citizen of a state other than the one in which distribution is made may establish his right to share in such an estate and enforce such adjudication against the administrator personally, or his sureties, or against any other person liable therefor, or proceed in any

way which does not disturb the actual possession of the property by the state court. See, also, Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33, 44, 30 S. Ct. 10, 54 L. Ed. 80; Commonwealth Trust Co. v. Bradford, 297 U. S. 613, 619, 56 S. Ct. 600, 80 L. Ed. 920; Princess Lida of Thurn and Taxis v. Thompson, 305 U. S. 456, 59 S. Ct. 275, 281, 83 L. Ed. 285.

Here no attempt is made to interfere with the administrator's possession of the estate or with the administration of the estate by the court. The estate has been closed, the property has been distributed to those claiming to be the heirs and entitled thereto; it stands in their names, and this is a proceeding not against the administrator but against those who procured the property. The proceeding is against them in their individual capacities, and is an attempt to deprive them of what it is alleged they procured through a void judgment resulting from the fraud practiced by them in its procurement. In Hewitt v. Hewitt, et al., 9 Cir., 17 F. 2d 716, it was held that a court of the United States in the exercise of its equity powers, where diversity of citizenship gives jurisdiction over the parties, may deprive a party of the benefits of a judgment or decree fraudulently obtained in a state court, since the decree operates on the parties and not on the state court. See, also, Marshall v. Holmes, 141 U. S. 589, 12 S. Ct. 62, 35 L. Ed. 870.

That a surety may maintain an action against its principal to obtain indemnity against its liability on the bond before it has been called upon to pay under the bond is unquestioned. Section 88, Okla. Stat. 1931, 12 Okla. Stat. Ann., Section 1108, provides:

"A surety may maintain an action against his principal, to obtain indemnity against the debt or liability for which he is bound, before it is due, whenever any of the grounds exist, upon which, by the provisions of this code, an order may be made for arrest and bail, or for an attachment."

[fol. 156] See also, Walton, et al. v. Williams, 5 Okla. 642, 49 P. 1022; Morley Const. Co., et al. v. Maryland Casualty Co., 8 Cir., 90 F. 2d 976; Glades County, Fla v. Detroit Fidelity & Surety Co., 5 Cir., 57 F. 2d 449.

It has also been frequently held that in such an action a receiver may be appointed pending the determination of the issues in the action for exoneration. Oklahoma Stat. Ann., Title 12, Section 1551, Sec. 773 Okla. Stat. 1931; Sanford v.

U. S. Fidelity & Guaranty Co., 116 Ga. 689, 43 S. E. 61; Stulz-Sickles Co. v. Fredburn Const. Corp., 114 N. J. Eq. 475, 169 At. 27; Central Surety & Ins. Corp., et al. v. Bagley, (D. C. Colo.) 44 F. 2d 808; Southwestern Surety Ins. Co. v. Wells (D. C. Pa.) 217 F. 294.

But, say appellants, here the surety company has been twice exonerated by the judgment of the court, and therefore there can be no possibility of liability on the bond. However, if the judgment of the county court is void, as it is alleged, then it is a nullity and can afford no protection to the surety on its bond, for a void judgment confers no right upon anyone. Condit v. Condit, 66 Okla. 215, 168 P. 456; Jefferson v. Gallagher, 56 Okla. 405, 150 P. 1071; Loeser v. Bank & Trust Co., 6 Cir., 163 F. 2d 2; 34 C. J., p. 509, § 811.

The whole controversy therefore centers around the question whether the judgment of the Probate Court was procured by fraud and is void.

From the record it appears that when Leggette D. Kelleam died, he was survived by E. A. Kelleam and Nell Southard, his brother and sister, and by two half sisters and a number of children of prior deceased half brothers and half sisters. Within five days of his death, appellants E. A. Kelleam and Nell Southard filed their petition in the County Court asking for the probation of the estate and that E. A. Kelleam be appointed administrator. Knowing of the existence of the heirs of the half blood, nevertheless they alleged that they were the only heirs of the deceased. Nell Southard's address was given as Blanchard, Oklahoma. E. A. Kelleam gave his address in the petition as care of Theral Hotel, Drumright, Oklahoma. Although it appears by inference that at the time of the filing of this petition he was a resident of Sells, Arizona, and notwithstanding that he was a non-resident, he did not call this to the court's attention, nor did he appoint a resident agent as required by Okla- [fol. 157] homa law. Section 1073, Okla. Stat. 1931, 58 Okla. Stat. Ann., Section 162. No notice was published of the pendency of the petition for administration of the estate. In due course of time E. A. Kelleam, as administrator, filed his final account asking that the estate be distributed to him and to his sister, Nell Southard, and that he be discharged as administrator. Here again it is alleged that he and his sister are the only heirs. No mention is made of the heirs of half blood, nor reason assigned why they would not in-

herit. Evidently, before this petition came on for hearing, Mrs. Fannie Bates, a half sister, and the husband and children of Mrs. Klyde Bates, another half sister, who had died since the death of Legette D. Kelleam, gained information of the estate. Now a contract is made by E. A. Kelleam and Nell Southard with these heirs, in which they agree to pay them $4,000, upon condition, however, that none of the other heirs of the half blood appear in the proceedings; that if they did, the $4,000 would not be paid. The money was placed in escrow with the contract to await the happening of the contingency upon which the contract was predicated. Then E. A. Kelleam files an amended petition for approval of final account and for determination of heirship, in which he for the first time lists the sisters of the half blood and the children of the prior deceased brothers and sisters of the half blood, giving their residence. And now for the first time he states that the estate is ancestral and therefore belongs to him and his sister.

An examination of the record reveals that the estate which is now claimed as ancestral could not possibly be such. The claim to the ancestral estate is that Leggette D. Kelleam inherited this property from his mother, Mary A. Kelleam, who died intestate on December 4, 1928. Her estate was duly probated and administered and at the time of her death consisted of five lots in the town of Blanchard, Oklahoma, the title to which, by final decree of the court entered September 2, 1929, became vested in Leggette D. Kelleam, E. A. Kelleam and Nell Southard, in equal shares. None of these lots was listed as assets of the estate of Leggette D. Kelleam, deceased. How flimsy the claim to the property as an ancestral estate is appears when we observe that the ancestor died December 4, 1928; that none of the property which is set forth in the inventory in the estate before us was owned by her during her lifetime. The record reveals that two Drumright, Oklahoma, properties were acquired by Leggette D. [fol. 158] Kelleam, one in 1932 and one in 1935; that the Oklahoma City properties were acquired in 1933; that the interest in the so-called Sam Vance lease was acquired in 1930; that a 1936 Model Ford automobile is claimed as ancestral property; that a number of notes claimed as ancestral property were all dated from one to seven years after the death of the ancestor.

When the appellee-heirs herein filed their petition to reopen the judgment in the County Court, E. A. Kelleam and

Nell Southard promptly proceeded to attempt to place the real estate beyond the possible reach of the other heirs in the event they succeeded in having the judgment set aside. Conveyances were made to their children without consideration. Such conduct is the act of a guilty conscience. When one has defrauded another and fears detection, he often seeks to manipulate the title to property in his hands so that it may not be available in the event judgment is recovered against him. The only conclusion which can be reached from an examination of the transcript is that E. A. Kelleam was a faithless trustee; that he designedly and intentionally proceeded from the beginning to conceal the status of the estate from the court and the heirs; and that he and his sister conspired together to defraud the remaining heirs of that which was their just due. The conclusion of the trial court is the only one that could be reached.

The judgment is Affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

Before Honorable Orie L. Phillips, Honorable Robert L. Williams, Circuit Judges, and Honorable Alfred P. Murrah, District Judge

JUDGMENT—June 17, 1940

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed; and that Maryland Casualty Company of Baltimore, Maryland, a corporation, Mrs. Ethel Riddler, Mrs. Dorothy Payne, J. K. Perkins, Mrs. F. Bates, Glen Perkins, Bessie Mathews, [fols. 159-178] Mrs. Elouise Kulp, Leggette Hall, Lamar Hall, Marguerite Bradley Kelleam, Mary Kate Hall, Kelleam Hall, Clifford Kelleam, Kathleen Kelleam, Dr. Fannin Kelleam, Francis Kelleam, Mrs. Jimmie Kelleam and Robert Kelleam, appellees, have and recover of and from E. A. Kelleam, Nell Southard, Joe E. Kelleam and Joe R. Southard, Jr., appellants, their costs herein.

[fol. 179] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—July 17, 1940

This cause came on to be heard on the petition of appellants for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

APPLICATION AND MOTION FOR STAY OF MANDATE—Filed July 25, 1940

Come now the appellants and respectfully pray this Honorable Court to stay the mandate herein and for grounds therefor show to the Court:

A. That the opinion was rendered and filed herein on the 17th day of June, 1940.

B. That within thirty days Petition for Rehearing was filed, which said petition was overruled July 17, 1940.

C. That appellants desire to and intend in good faith to file application in the Supreme Court of the United States for a Writ of Certiorari for review of said decision.

Wherefore, appellants respectfully pray that mandate not issue herein for a period of thirty days and pending the filing in the Supreme Court of the United States of an application for a Writ of Certiorari; that upon filing said application in said court the mandate in this cause be further stayed in accordance with the rules of this court pending determination of said cause by said court.

Glenn O. Young, Attorney for Appellants.

[File endorsement omitted.]

CERTIFICATE OF COUNSEL

Glenn O. Young, counsel for appellants, hereby certifies that the above and foregoing motion to stay mandate in his

opinion is meritorious and well founded in point of law and point of fact and is not filed for the purpose of delay.

[fol. 180] And that copies thereof were served upon opposing counsel this the 23rd day of July, 1940.

Glenn O. Young, Attorney for Appellants.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER GRANTING MOTION FOR STAY OF MANDATE—July 25, 1940

This cause came on to be heard on the motion of appellants for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service under Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 181] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 182] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 183] IN SUPREME COURT OF THE UNITED STATES

STIPULATION RELATIVE TO PRINTING RECORD IN THE SUPREME COURT OF THE UNITED STATES—Filed November 4, 1940

Whereas, it appears necessary to reprint the record herein for the use of the Supreme Court of the United States, and it further appears that the printed record contains matters not essential to a consideration of the questions presented by the petition for the writ,

Now, Therefore, this Agreement witnesseth that counsel for petitioners and counsel for respondents stipulate and agree that the following parts, portions and pages of said printed Transcript of Record may be omitted from the reprinted record prepared under the supervision of the Honorable Charles Elmore Cropley Clerk of this Court, such omitted portions to be appropriately evidenced by reference to this Stipulation;

(1) Verification on page 11 of the transcript of the record from the Circuit Court of Appeals as indicated by copy hereto attached.

(2) The verification shown at the top of page 22 of the transcript of the record from the Circuit Court of Appeals.

(3) All matters beginning on page 30 starting with "Order appointing Appraisers" and including Exhibit "F" on page 32 and ending on page 39, preceding the words Exhibit "G", of the transcript of the record from the Circuit Court of Appeals.

[fol. 184] (4) The verification on page 60 of the transcript of the record from the Circuit Court of Appeals.

(5) It is Stipulated and Agreed that the petition for and brief by the appellants in the Circuit Court of Appeals for rehearing may be omitted, same being pages 161 to and including 178 thereof to and including the words Glenn O. Young, attorney for the Appellants.

All of the above deletions in accordance with this stipulation are shown by a copy of the transcript of the record from the Circuit Court of Appeals bearing penciled crossouts, given to the clerk of this Honorable Court along with this stipulation, so that he may clearly see what is to be omitted hereby.

In Witness Whereof, the undersigned have hereunto subscribed their names.

Warren E. Miller, Glenn O. Young, Attorneys for petioners. John J. Carmody, Green & Farmer, by W. E. Green, Heber Finch, R. A. Young, Jr., Pliney S. Fry, Attorneys for Respondents.

[fol. 185] [File endorsement omitted]

Endorsed on Cover: File No. 44,698. U. S. Circuit Court of Appeals, Tenth Circuit, Term No. 349. E. A. Kelleam, Nell Southard, Joe E. Kelleam and Joe R. Southard, Jr., Petitioners, vs. Maryland Casualty Company of Baltimore, Maryland, Mrs. Ethel Riddler, Mrs. Dorothy Payne, et al. Petition for a writ of certiorari and exhibit thereto. Filed August 20, 1940. Term No. 349 O. T. 1940.

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SUPREME COURT OF THE UNITED STATES

No. 349...

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM and JOE R. SOUTHARD, JR., *Petitioners*,

vs.

MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, a corporation, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, J. K. PERKINS, MRS. F. BATES, GLEN PERKINS, BESSIE MATHEWS, MRS. ELOUISE KULP, LEGGETTE HALL, LAMAR HALL, MARGUERITE BRADLEY KELLEAM, MARY KATE HALL, KELLEAM HALL, CLIFFORD KELLEAM, KATHLEEN KELLEAM, DR. FANNIN KELLEAM, FRANCIS KELLEAM, MRS. JIMMIE KELLEAM, and ROBERT KELLEAM,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

WARREN E. MILLER,
Washington, D. C.,
Attorney for Petitioners.

GLENN O. YOUNG,
Sapulpa, Oklahoma,
Of Counsel.

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INDEX.

Subject Index.

PETITION FOR WRIT OF CERTIORARI.

Summary Statement of the Matter Involved..... 2

Basis of the Court's Jurisdiction..... 5

Questions Presented..... 5

Reasons Relied Upon for Allowance of Writ..... 7

Prayer..... 7

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinion of the Court Below..... 8

Statement of the Case..... 8

Specifications of Error..... 10

Argument and Authorities..... 12

I. Jurisdiction of the County Courts of Oklahoma in probate matters is exclusive original jurisdiction..... 15

II. That jurisdiction was duly invoked and exercised prior to the institution of the instant proceeding as to both the subject matter and the parties..... 16

III. It was the duty of the federal court when suit was there filed to dismiss for want of jurisdiction..... 18

(A) Because the jurisdiction of the County Court had already been invoked..... 18

(B) Because the action was not local under 28 U.S.C.A., Secs. 116-118..... 21

(C) Because there was no diversity of citizenship between the real parties in interest as required by 28 U.S.C.A., 111-112..... 22

IV. The writ of certiorari should issue..... 27

Appendix I..... 29

Table of Cases.

Adair vs. Montgomery, 74 Okl. 21, 176 P. 911.... 16
Albert vs. Bascom, 245 F. 149..... 21
American Construction Co. vs. Jacksonville, etc., R. Co., 148 U. S. 372, 13 S. Ct. 758, 37 L. ed. 486.. 28
Anderson vs. Watt, 138 U. S. 694, 11 S. Ct. 449, 34 L. ed. 1078.....26, 27
Antene vs. Jensen, 47 Okl. 352, 148 P. 727..... 26
Asher vs. Bone, 100 F. (2d) 315..... 23

Bacher vs. Levy, 82 F. (2d) 270..... 23
Bank of Commerce & Trust of Richmond, Va., vs. McArthur, 248 F. 138..... 22
Barnett's Estate, In re, 52 Okl. 623, 153 P. 653.... 16
Barrett's Estate, In re, 181 Okl. 262, 72 P. (2d) 482..... 16
Berg vs. Merchant, 16 F. (2d) 990..... 23
Blake vs. Metz, 136 Okl. 150, 276 P. 765..... 26
Blythe vs. Hinckley, 173 U. S. 501, 19 S. Ct. 497, 43 L. ed. 783..... 21
Broderick's Will, 21 Wall. 503, 22 L. ed. 599..... 19
Bryan vs. Seiffert, 185 Okl. 496, 94 P. (2d) 526.... 15
Byers vs. McAuley, 149 U. S. 608, 13 S. Ct. 906, 37 L. ed. 867..... 19

Calkin vs. Wolcott, 182 Okl. 278, 77 P. (2d) 96.... 17
Clarke vs. Boysen, 39 F. (2d) 800..... 24

Desmare vs. U. S., 93 U. S. 605, 23 L. ed. 959..... 26
Dillard vs. Franklin, 57 P. (2d) 629, 177 Okl. 34.. 16
Dodds vs. Palmer Mountain Tunnel Co., 188 F. 447. 20
Dormitzer vs. Ill., etc., Bridge Co., 6 F. 217..... 21
Douglas' Estate, In re, 185 Okl. 25, 90 P. (2d) 35.. 16

Employers Reinsurance Corp. vs. Bryant, 299 U. S. 374, 57 S. Ct. 273, 81 L. ed. 289..... 24

Evans vs. Gorman, 115 F. 399 20
Ewing vs. St. Louis, 5 Wall. 413, 72 U. S. 808, 18 L. ed. 657 21

Farrell vs. O'Brien, 199 U. S. 89, 25 S. Ct. 727, 50 L. ed. 101 19
Findlay vs. Florida East Coast Ry. Co., 68 F. (2d) 540 21
First Nat. Bank of Rome, Ga., vs. First Nat. Bank of Jasper, Fla., 264 F. 83 24
First Nat. Bank of Rome, Ga., vs. Bank of Jasper, 264 F. 88 24
Fisher vs. Perkins, 122 U. S. 522, 7 S. Ct. 1227, 30 L. ed. 1192 19
Forsyth vs. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 S. Ct. 665 28
Freeney vs. First Nat. Bank of Plattsmouth, 16 F. 433 20

Gassin vs. McJunkin, 173 Okl. 210, 48 P. (2d) 320 ..... 17, 18
Garzot vs. Rios de Rubio, 209 U. S. 283, 28 S. Ct. 548, 52 L. ed. 794 19
Gentry's Estate, In re, 158 Okl. 196, 13 P. (2d) 156. 16
Goff vs. Goff, 124 Okl. 63, 253 P. 1014 17
Goodrich vs. Ferris, 214 U. S. 71, 29 S. Ct. 580, 53 L. ed. 914 17
Greer, Mills & Co. vs. Stroller, 77 F. 1 23

Hagan vs. Walker, 14 How. 29, 14 L. ed. 312 23
Hartford Accident & Indemnity Co. vs. Golberg, 178 Okl. 75, 61 P. (2d) 704 17
Hines vs. Armstrong, 182 Okl. 344, 77 P. (2d) 671 .. 16

Irwin vs. Mo. Valley Bridge Co., 19 F. (2d) 300, 275 U. S. 540, 48 S. Ct. 36, 72 L. ed. 415 23

Kieley vs. McGlynn, 21 Wall. 503, 22 L. ed. 599 19

Lau Ow Bew vs. U. S., 144 U. S. 47, 36 L. ed. 340, 12 S. Ct. 517 28

Mallow vs. Hinde, 6 L. ed. 599, 12 Wheat. 193 23
McNutt vs. General Motors Accept. Corp., 298 U. S. 178, 56 S. Ct. 780, 80 L. ed. 1135 24
Mitchell vs. Maurer, 293 U. S. 237, 55 S. Ct. 162, 79 L. ed. 338 23
Monk vs. Morgan, 48 Cal. App. 154, 192 P. 1042 17

Orton vs. Smith, 18 How. 263, 15 L. ed. 393 21

Parker vs. Lewis, 45 Okl. 807, 147 P. 310 16
Peck vs. Jenness, 7 How. 612, 12 L. ed. 841 20

Roberts vs. Lewis, 144 U. S. 653, 36 L. ed. 579, 12 S. Ct. 781 28
Roller vs. Murray, 234 U. S. 738, 34 S. Ct. 902, 58 L. ed. 1570 19

Security Trust Co. vs. Black River Nat. Bank, 187 U. S. 211, 23 S. Ct. 52, 47 L. ed. 147 18
Shainwald vs. Lewis, 5 F. 510 22
Simon vs. Hine, et al., 78 Okl. 224, 190 P. 264 23
Simon vs. Shaffer, 11 Fed. Supp. 450 23
Sims vs. Billings, 162 Okl. 51, 18 P. (2d) 1084 17
Sims' Estate, Appeal of, 162 Okl. 35, 18 P. (2d) 1077 18
Smith vs. Jennings, et al., 238 F. 48 ..... 19, 20
Southwestern Bell Telep. Co. vs. State, 75 Okl. 42, 181 P. 487 23
State ex rel. Morrell vs. Worten, 161 Okl. 130, 17 P. (2d) 424 15
Stratton vs. Stratton, 239 U. S. 55, 36 S. Ct. 26, 60 L. ed. 142 19
Sutter vs. Sockey, 97 Okl. 107, 223 P. 161 16

Sutton vs. English, 246 U. S. 199, 38 S. Ct. 254, 62 L. ed. 664..... 21
Sun Printing & Pub. Assn. vs. Edwards, 194 U. S. 377, 24 S. Ct. 696, 48 L. ed. 1027..... 26

Thompson's Estate, In re, 179 Okl. 240, 65 P. (2d) 442..... 15, 16

U. S. vs. Bean, 253 F. 1..... 23

Vidal vs. South American Securities Co., 276 F. 855..... 22

Waters-Pierce Oil Co. vs. Texas, 212 U. S. 86, 29 S. Ct. 220, 53 L. ed. 417..... 19
Wells vs. Helms, 105 F. (2d) 402..... 15, 17
Wheeler vs. Bigheart, 172 Okl. 262, 43 P. (2d) 1028. 17
Wilson vs. Beard, 26 F. (2d) 860..... 21
Wise vs. Cutchall, 171 Okl. 60, 41 P. (2d) 864..... 16
Wolfe vs. Graham, 185 Okl. 318, 90 P. (2d) 1067.. 17
Wright vs. Saltmarsh, 174 Okl. 226, 50 P. (2d) 694. 18

Zahn vs. Obert, 60 Okl. 118, 159 P. 298..... 26

Statutes.

Act Mar. 3, 1875 (18 Stat. L. 472)..... 24

U.S.C.A., Tit. 28, Secs. 111-112..... 11, 22
U.S.C.A., Tit. 28, Secs. 116-118..... 4, 6, 11, 12, 21
U.S.C.A., Tit. 28, Sec. 118..... 5, 10
U.S.C.A., Tit. 28, Sec. 344..... 19
U.S.C.A., Tit. 28, Sec. 347..... 28

Okl. Const., Art. VII, Secs. 13-16..... 15, 17

O. S. A., Tit. 58, Sec. 724..... 16
O. S. A., Tit. 58, Secs. 122-3..... 17
O. S. A., Tit. 12, Sec. 269..... 26

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SUPREME COURT OF THE UNITED STATES

No. .....

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM and JOE R. SOUTHARD, JR., *Petitioners,*

vs.

MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, a corporation, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, J. K. PERKINS, MRS. F. BATES, GLEN PERKINS, BESSIE MATHEWS, MRS. ELOUISE KULP, LEGGETTE HALL, LAMAR HALL, MARGUERITE BRADLEY KELLEAM, MARY KATE HALL, KELLEAM HALL, CLIFFORD KELLEAM, KATHLEEN KELLEAM, DR. FANNIN KELLEAM, FRANCIS KELLEAM, MRS. JIMMIE KELLEAM, and ROBERT KELLEAM,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners E. A. Kelleam, Nell Southard, Joe E. Kelleam, and Joe R. Southard, Jr., respectfully pray certiorari to review a decision of the United States Circuit Court of Appeals for the Tenth Circuit affirming a decree of the United States District Court for the Northern District of Oklahoma, which they assert was entered without jurisdiction or venue under the Constitution and Laws of the United States and contrary to the applicable pro-

visions of the local law and which involves the State and Federal Courts in a direct conflict, the one deciding the identical controversy one way, the other another. The opinion of the Circuit Court of Appeals, which does not appear in any published reports, appears in the record herewith presented at pages 149 to 159; the decree of the District Court appears at R. 88.

SUMMARY STATEMENT OF THE MATTER INVOLVED.*

Leggette D. Kelleam died intestate a resident of Creek County, Oklahoma, survived by E. A. Kelleam and Nell Southard, his brother and sister, by Fannie Bates and Mrs. Klyde Bates, paternal half-sisters, and by children of five deceased paternal half-brothers and sisters. Upon joint petition of the brother and sister, the brother was appointed administrator of the estate by the County Court of Creek County. He qualified by executing a statutory administrator's bond with the Maryland Casualty Company as surety, administered upon the estate, and presented his final account for approval. By an amended petition for determination of heirship and distribution he alleged that the estate was a maternal ancestral estate and that he and his sister were the sole heirs. After notice by publication, as required by the statutes of the State of Oklahoma, the County Court entered its decree adjudging the full brother and sister to be the heirs, ordering distribution of the estate to them, discharging the administrator and exonerating the bond. No appeal was prosecuted by any adverse claimant and the decree became final.

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* For appropriate references to exhibits and pages of the printed Record supporting this statement, please see Appendix, p. 29.

Thereafter the half-blood nephews and nieces instituted in the County Court proceedings to vacate the decree of heirship and to recover an interest in the estate. Upon trial the County Court on September 15, 1937, sustained a demurrer to the amended petition and ordered the proceedings to vacate the decree dismissed. An appeal was prosecuted by the half-blood claimants to the District Court of Creek County.

Some months thereafter attorneys for the Maryland Casualty Company which had been a party to the proceedings in the County Court and attorneys for the defeated claimants conceived a plan to feign an issue in the federal court in an effort to circumvent the judgments of the County Court and the appellate tribunals of the state. Conformably the surety filed an equitable action in the United States District Court for the Northern District of Oklahoma against all the contending claimants asking that a receiver be appointed to take charge of the decedent's estate, the property impressed with an equitable lien to satisfy the claims of the half-blood kinsmen whom the surety averred were entitled to inherit and that its bond be exonerated.

Upon the date this suit was filed one of the half-blood contestants appeared in Tulsa in the Northern District and submitted to personal service. A few days afterward all remaining half-blood contestants voluntarily appeared by their attorneys and filed answer and cross-petition wherein they joined in the prayer of the surety company for a receiver, and asked that court to decree void the judgment of the County Court upon the same grounds which they had theretofore advanced in the County Court, and that they be decreed entitled to inherit.

Asserted ground of jurisdiction in the federal court was diversity of citizenship. Non-resident process was issued and served upon E. A. Kelleam and his son in the State of Arizona where they were domiciled; chancery subpoena was served upon the sister and her son at Blanchard, Okla., in the Eastern District, where they resided and had their citizenship. The nominal plaintiff, Maryland Casualty Company, is a resident and citizen of Maryland; the cross-petitioners who were named as defendants, but for whose benefit the suit was in fact instituted, were residents variously of Oklahoma, California, Arkansas and Texas, except one, Kelleam Hall, whose residence and citizenship was neither established by the evidence nor the court's findings. None of the parties resided in the Northern District of Oklahoma, and when the parties are aligned in accordance with their real interests there is no complete diversity of citizenship.

Pleas to venue and jurisdiction over the parties and the subject matter were presented to the trial court by the petitioners, overruled and exceptions saved. The court while treating the action as local under Sections 116-118, 28 U.S.C.A., attempted to readjudicate all matters theretofore determined by the County Court, held the judgment of that court that the property was ancestral void, that cross-petitioners were heirs and owners of a five-ninths interest, directed E. A. Kelleam and Nell Southard to account to cross-petitioners for five-ninths of the estate, the value of which was not determined, and decreed cross-petitioners to have a lien upon the property in the hands of a receiver to satisfy the judgment. The decree further determined the Maryland Casualty Company liable to the extent of $12,000 (but did not specify to whom), and decreed it entitled to exoneration by having the property in the hands of the receiver applied to the interest of the cross-petitioners.

BASIS OF THE COURT'S JURISDICTION.

Obviously any effort to enforce the decree of the United States District Court will involve the federal and state courts in direct conflict, and review by certiorari is sought upon this and other grounds.

Jurisdiction of the Supreme Court of the United States is invoked under Sec. 240 of the Judicial Code as amended by the Act of February 13, 1925 (Chap. 225, 43 Stat. 938, 28 U.S.C.A. 347) and under Para. 5 (b) of Rule 38.

The decree of the United States District Court was entered June 21, 1939; the final opinion of the United States Circuit Court of Appeals for the Tenth Circuit, upon appeal timely prosecuted, July 17, 1940, and on July 25, 1940, conformable to the rules, said Circuit Court by order stayed its mandate pending filing within thirty days of the instant proceedings.

QUESTIONS PRESENTED.

1. After final judgment has been entered by a County Court of the State of Oklahoma in the exercise of its probate jurisdiction to administer upon the estates of deceased persons which determined heirship, ordered and approved distribution, discharged its administrator and exonerated his statutory administrator's bond, may the non-resident surety upon such administrator's bond by entering suit in the United States District Court ostensibly for exoneration upon the bond against the principal, who is also a non-resident, invest jurisdiction in that court upon non-resident service under Section 118, 28 U.S.C.A., to decree void the judgment of the County Court exonerating the bond, and enter judg-

ment imposing personal liability upon the surety and the administrator?

2. After a County Court of the State of Oklahoma in the exercise of its jurisdiction to review its own decrees has rendered a judgment sustaining its decree of heirship from which an appeal has been taken conformable to the state law to the District Court of the state, may a non-resident surety upon the administrator's bond who was a party to the proceeding in the County Court, by instituting an original action in equity in the United States District Court upon service as in a local action under the provisions of Sections 116-118, 28 U.S.C.A., invest jurisdiction in that court to supersede the County Court and the appellate tribunals of the state to appoint a receiver of the decedent's estate, to review on questions of law and fact the correctness of the County Court's proceedings, void its judgment, determine heirship, direct an accounting by the administrator and persons determined lawful distributees by the County Court, impress a lien upon the decedent's estate (part of which is realty located in the district), and order the same foreclosed, upon the theory that the action is a *local* action, where there is no diversity of citizenship between the contending claimants and no party to the proceeding, either plaintiff or defendant, is a resident of the district in which the suit is instituted and questions of jurisdiction and venue are properly raised in the pleadings and preserved in the record?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

Petitioners herein show that the decree and opinion herein complained of involves the Federal and State Courts in Oklahoma in direct conflict of jurisdictions under circumstances that are novel and unusual and believed to be without exact precedent in the reported cases; that the Circuit Court has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision and has decided jurisdictional questions where jurisdiction is dependent upon diversity of citizenship and residence in the district in a manner in conflict with the applicable decisions of the Supreme Court of the United States and in conflict with decisions of other Circuit Courts of Appeal on the same matter, and has decided an important question of local law in a way that conflicts not only with local decisions governing the same matter but is directly contrary to a local decision upon the identical matter.

Wherefore, petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Tenth Circuit.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Certiorari is sought to review an opinion of the United States Circuit Court of Appeals, not yet officially reported, which is set forth at R. 149 and wherein that court affirmed a decree of the United States District Court for the Northern District of Oklahoma entered without opinion upon findings of fact and conclusions of law, which appear at R. 77 to 92. The case is of general importance for the decree complained of is directly contrary to a prior adjudication of the identical controversy by a state court of competent jurisdiction, and its attempted enforcement will bring state and federal tribunals into direct conflict. Moreover, if the unusual procedure attempted is finally approved, a flood-gate is opened for a new and different type of litigation in the federal courts—suits in equity to "exonerate" sureties upon judicial bonds whereby all usual state court proceedings pending on appeal or after judgment can be brought into the federal courts for review, provided only the official surety is a non-resident. The jurisdiction of this court is invoked upon the grounds set forth in the petition, *supra*, p. 1.

STATEMENT OF THE CASE.

For brevity and to avoid duplication, a concise statement of the case, containing all that is material to consideration of the questions presented, has been incorporated in the petition for certiorari, *supra* (pp. 1-4). Appropriate page references to portions of the record and exhibits arranged in the order referred to and supporting the statement are appended as Appendix I. (See p. 29.)

From the foregoing it will be observed that this case presents a situation which is most extraordinary. A non-resident surety, which had been twice exonerated by the judgment of the court in which the bond was filed, instituted a suit in equity in the federal court against its principal for still a third "exoneration." The real purpose of the suit was not to exonerate the bond but to involve its principal in burdensome and expensive litigation for the benefit of third persons, whose rights had already been adjudicated in a court of competent exclusive original jurisdiction. To lend color to the complaint, the surety attempted to confess that its principal had perpetrated a fraud, not upon the surety, but upon third parties who themselves had been defeated in an effort to sustain those very charges of fraud in the County Court. These third parties, who could not themselves invoke the jurisdiction of the federal court because there was no diversity of citizenship, by cross-petition adopting the allegation and prayer of the surety, seek thereby to invest jurisdiction in the federal court to enter a decree countermanding the prior decrees of the state tribunal.

That there is no complete diversity of citizenship among the contending heirs is clear from the record. One full-blood claimant, Nell Southard, and her alleged grantee, Joe R. Southard, Jr., who was made a defendant, are residents of Blanchard, Oklahoma, of which state two of the defeated claimants (Francis Kelleam and Jimmie Kelleam) were also citizens. The only substantial controversy that could possibly exist between the non-resident surety and its principal, E. A. Kelleam, was a controversy grounded upon the bond and involving the validity of the judgments of the County Court. Neither the principal nor surety resided in the State of Oklahoma and no litigant, either plaintiff or defendant, resided in the Northern District of Oklahoma.

The case presents questions not only of an unusual nature but of unusual importance, for if a surety upon an administrator's bond in the Probate Court by instituting suit in the federal court for exoneration against the administrator may invoke the jurisdiction of the federal court to probate an estate, even to the extent of circumventing and nullifying valid judgments previously entered by the Probate Court and in effect countermanding its orders to its own officers by assessing penalties for compliance, and to supersede all appellate tribunals of the state, the authority of such state courts where it happens the surety is a non-resident for all practical purposes is at an end. The procedure adopted lends itself to every situation where the statutory liability of a non-resident surety upon a judicial bond may be involved.

SPECIFICATIONS OF ERROR.

Jurisdictional errors in the proceedings complained of are as follows:

I. After final judgment had been entered by a County Court of the State of Oklahoma in the exercise of its probate jurisdiction to administer upon the estates of deceased persons, which judgment decreed heirship, ordered and approved distribution, discharged its administrator and exonerated his statutory administrator's bond, it was error to permit the non-resident surety upon such administrator's bond to enter suit in the United States District Court ostensibly for another "exoneration" upon the bond against the principal, who was also a non-resident, and upon non-resident service under Section 118, 28 U.S.C.A., to decree void the judgment of the County Court exonerating the bond, and to enter judgment imposing liability upon the surety and the administrator.

II. If such an action may be maintained it is local under the provisions of Sections 116-118, 28 U.S.C.A., and not transitory nor governed by Sections 111-112, 28 U.S.C.A., and the contrary holding was error.

III. After a County Court of the State of Oklahoma in the exercise of its jurisdiction to review its own decrees has rendered judgment in a proceeding to vacate that court's final decree from which an appeal has been taken conformable to the state law to the District Court of the state, it was error to permit a non-resident surety upon the administrator's bond who was a party to the proceeding in the County Court to institute an original action in equity in the United States District Court and for that court to assume jurisdiction to supersede the County Court and the appellate tribunals of the state, and upon service as in a local action under the provisions of Sections 116-118, 28 U.S.C.A., to appoint a receiver of the decedent's estate, reinvestigate on questions of law and fact the correctness of the County Court's decree of heirship and distribution and its order discharging the bond, determine heirs, direct an accounting by the persons adjudged lawful distributees by the County Court, impress a lien in favor of the losing claimants in the County Court upon the decedent's estate (part of which is realty located in the district), and order the same foreclosed, upon the theory that the action was a *local* action, where there was no diversity of citizenship between the contending claimants and no party to the proceeding, either plaintiff or defendant, a resident of the district in which the suit was instituted and questions of jurisdiction and venue were properly raised in the pleadings and preserved in the record.

ARGUMENT AND AUTHORITIES.

Analysis of the opinion of the Circuit Court of Appeals indicates that jurisdiction in the United States District Court was sustained solely under Sections 116 and 118, 28 U.S.C.A., which sections provide that a local action involving property of a fixed character lying partly in one district and partly in another may be brought in the District Court of either district and that service of summons on absent defendants may be had in suits to enforce liens. That court held Sections 111-112, 28 U.S.C.A., upon which appellants relied, inapplicable.

The nature of the suit in the opinion of the Circuit Court is variously stated:

A: "*This is an action to impress a trust on real and personal property with a fixed situs in the Northern and Western Districts of Oklahoma.*" (R. 154. Italics added.)

B: "The estate has been closed, the property * * * distributed * * *, and *this is a proceeding not against the administrator but against those who procured the property.* The proceeding is against them *in their individual capacities*, and is an attempt *to deprive them of what it is alleged they procured through a void judgment* * * *." (R. 155. Italics added.)

C: "That a surety may maintain an action against its principal to obtain indemnity * * * is unquestioned. * * * in such an action a receiver may be appointed pending the determination of the issues in the action for exoneration. * * * But, say appellants, here the surety company has been twice exonerated. * * * *The whole controversy therefore centers around the question whether the judgment of the Probate Court was procured by fraud and is void.*" (R. 155-6. Italics added.)

The Circuit Court conceded and the trial court found no complete diversity of citizenship between the contending claimants. Insofar as the action was one to impress a trust upon real and personal property, there was no complete diversity of citizenship between those seeking this relief. The surety joined by the half-blood claimants some of whom were residents of Oklahoma were opposed by the administrator and distributees under the order of the County Court, some of whom were also residents of Oklahoma. Insofar as the proceeding was not against the administrator but against those who procured the property to deprive them of what they procured through a void judgment, there was no complete diversity of citizenship because resident claimants were aligned on opposite sides. With respect to the action of the surety to maintain indemnity against its principal and the appointment of a receiver pending determination of the issues, the Circuit Court concedes that *the whole controversy centers around the validity of the judgment of the Probate Court.* This necessarily follows, for if the judgment is valid, the surety is not entitled to indemnity or to a receiver. Obviously, in any proceeding to void the judgment all whose rights are affected by it must be made parties and when these are aligned in accordance with their true interests, the administrator and the surety and the distributees under the decrees of the County Court and their grantees must be arraigned against the half-blood claimants. When this is done, there is again no diversity of citizenship between the real parties in interest.

The decree and judgments of the court below erroneously sustain jurisdiction in the federal courts to hold an administrator liable as such for executing the orders of the court of which he was an officer. After the

County Court's jurisdiction to review its own decree had been properly invoked and after judgment was rendered by it sustaining the questioned decree, which judgment under the state law was final, subject only to be vacated or set aside on appeal, the United States District Court was without jurisdiction to intervene by appointment of receiver and take charge of the entire litigation at the instance of a surety who was the beneficiary of the County Court's judgment. That it did do so clearly constitutes an unauthorized exercise of judicial authority.

The opinion asserts that the County Court judgment was procured by fraud and was therefore void, but the acts charged as fraud (failure to give notice of the application for appointment as administrator and personal notice of the proposed distribution) are mere procedural acts like failure to issue some form of process. These acts are not required by the statutes of the state, and such omissions have been held not fraudulent nor necessary both by the prior decree of the County Court and by decisions of the Supreme Court of the State of Oklahoma in like cases.

Obviously a settlement which in no manner affected the rights of any party to this suit could not constitute fraud, but to reinforce charges of fraud, the opinion refers to conveyances after the judgment of the County Court sustaining its decree of heirship as acts of a "faithless trustee." Such conveyances were not by the administrator at all, but by distributees whose ownership of the property had been twice upheld by the County Court and in strict conformity with their rights under the judgment. Why such acts should be condemned with such severity is hard to understand.

Intervention by certiorari is imperative for otherwise the parties are confronted by directly conflicting judgments of state and federal tribunals. The state court, whose jurisdiction was first invoked and in which both the initial proceedings to adjudicate heirship and the second proceeding to determine the validity of the first adjudication, decided every issue which the federal court subsequently attempted to decide differently. Judgments of the state court in the circumstances are conclusive and the federal courts without jurisdiction.

I. Jurisdiction of the County Courts of Oklahoma in probate matters is exclusive original jurisdiction.

> "The County Court shall have the general jurisdiction of a Probate Court. It shall * * * grant letters testamentary and of administration, settle accounts of * * * administrators, * * * transact all business appertaining to the estates of deceased persons, * * * and distribution thereof. * * *." Const. Okla., Art. VII, Sec. 13.

Incident to probate jurisdiction, such County Courts may upon final settlement and distribution determine the heirs to whom the estate shall go. *In re Thompson's Estate,* 179 Okl. 240, 65 P. (2d) 442. Certiorari denied, *St. John* v. *Thompson,* 58 S. Ct. 38, 302 U. S. 718, 82 L. ed. 554; *Wells* v. *Helms* (C.C.A. 5th Cir., Okl.), 105 F. (2d) 402.

Where administration proceedings are pending in the County Court, or may be instituted therein, District Courts have no jurisdiction or power to undertake to administer upon such an estate. *Bryan* v. *Seiffert,* 185 Okl. 496, 94 P. (2d) 526. *State ex rel. Morrell* v. *Worten,* 161 Okl. 130, 17 P. (2d) 424.

The District Courts of Oklahoma have no power to appoint receivers for decedents' estates while administration proceedings are pending. *Dillard* v. *Franklin*, 57 P. (2d) 629, 177 Okl. 34.

The jurisdiction of the District Court in probate matters is appellate only. *In re Gentry's Estate*, 158 Okl. 196, 13 P. (2d) 156; *In re Douglas' Estate*, 185 Okl. 25, 90 P. (2d) 35; *In re Barrett's Estate*, 181 Okl. 262, 72 P. (2d) 482; *Wise* v. *Cutchall*, 171 Okl. 60, 41 P. (2d) 864; *Parker* v. *Lewis*, 45 Okl. 807, 147 P. 310.

The decree of the County Court determining heirship, rendered as incident to final settlement, unless appealed from, is conclusive. *In re Thompson's Estate*, 179 Okl. 240, 65 P. (2d) 442.

The appeal must be taken by a person interested, who was present, within ten days, and by a person interested, who was not a party, and not present, within thirty days. 58 O. S. A. 724; *In re Barnett's Estate*, 52 Okl. 623, 153 P. 653.

District Courts have no jurisdiction until and unless an appeal is prosecuted in compliance with this section. *Adair* v. *Montgomery*, 74 Okl. 21, 176 P. 911.

Provisions as to time must be observed. *Sutter* v. *Sockey*, 97 Okl. 107, 223 P. 161; *Hines* v. *Armstrong*, 182 Okl. 344, 77 P. (2d) 671.

II. That jurisdiction was duly invoked and exercised prior to the institution of the instant proceeding as to both the subject matter and the parties.

The surety, the administrator, and the contending heirs were all parties to the proceedings in the County Court. "Q. Mr. Green did appear in the County Court?"

"A. That is right, he was representing the Maryland Casualty Company." (R. 107.) See also R. 25, 43, 46, 123, 125, 96, 98, 101 and 102.

The statutes of the State of Oklahoma require no personal notice to persons claiming a right to inherit. Jurisdiction to distribute property, real and personal, depends upon notice by publication, which in effect is a summons to the world. *Monk* v. *Morgan,* 49 Cal. App. 154, 192 P. 1042; *Gassin* v. *McJunkin,* 48 P. (2d) 320, 173 Okl. 210; *Wells* v. *Helms,* 105 F. (2d) 402 (C.C.A. Okl. 2); *Goff* v. *Goff,* 124 Okl. 63, 253 P. 1014; *Wolfe* v. *Graham,* 185 Okl. 318, 90 P. (2d) 1067.

The service provided by statute has been upheld as constitutional. *Goodrich* v. *Ferris,* 214 U. S. 71, 29 S. Ct. 580, 53 L. ed. 914.

The decree of distribution is binding on both the administrator and his sureties. *Hartford Accident & Indemnity Co.* v. *Goldberg,* 61 P. (2d) 704, 178 Okl. 75. County Court judgments are entitled to the same presumptions of validity that attend those of other courts. Okla. Const., Art. VII, Secs. 13, 16; *Calkin* v. *Wolcott,* 77 P. (2d) 96, 182 Okl. 278.

The County Court also had the jurisdiction to review its own decree for fraud or irregularities which it exercised. *Wheeler* v. *Bigheart,* 172 Okl. 262, 43 P. (2d) 1028. The parties conceded this jurisdiction and first sued in the County Court. *The judgment of the County Court refusing to vacate the decree was in conformity to local law.*

The full-blood brother was entitled to Letters of Administration upon application forthwith and without notice. Sections 122-123, 58 O. S. A.; *Sims* v. *Billings,*

162 Okl. 51, 18 P. (2d) 1084; *Appeal of Sims' Estate,* 162 Okl. 35, 18 P. (2d) 1077, holding that:

> "A party under the statute having the prior right of appointment of administrator is entitled to the appointment without notice to anyone."

That the administrator failed to give personal notice to or assert that claimants he contended were not heirs were in fact heirs was not fraud. *Wright* v. *Saltmarsh,* 174 Okl. 226, 50 P. (2d) 694; *Gassin* v. *McJunkin,* 48 P. (2d) 320, 173 Okl. 210.

Laches and limitations were of course available as defenses in the County Court. The evidence before that court is not in the record, but it is established that at the trial in the federal court Ethel Riddler, one of the half-blood claimants, testified: "My sister heard that the estate had been administered and told me. That was two years ago last October." The date so fixed was prior to the decree of heirship and this evidence stands undisputed.

The construction of administration laws of the state by the Supreme Court of the state is binding on the federal courts. Such laws are not merely rules of practice, but laws limiting the rights of the parties. *Security Trust Co.* v. *Black River Nat. Bank,* 187 U. S. 211, 23 Sup. Ct. Rep. 52, 47 L. ed. 147.

III. It was the duty of the federal court when suit was there filed to dismiss for want of jurisdiction.

(A) Because the jurisdiction of the County Court had already been invoked.

When the surety entered suit in the federal court the prior jurisdiction of the County Court had attached

and been exercised. An appeal from the judgment sustaining the decree was pending in the appellate courts of the state.

The federal courts do not have general appellate jurisdiction to review judgments of the state courts, but limited jurisdiction as provided by 28 U.S.C.A., Sec. 344; *Waters-Pierce Oil Co.* v. *Texas* (Tex. 1909), 212 U. S. 86, 29 S. Ct. 220, 53 L. ed. 417; *Roller* v. *Murray,* 234 U. S. 738, 34 S. Ct. 902, 58 L. ed. 1570, and cases therein cited.

Authority to review under this section is limited to review of final judgments of the court of last resort of the state. *Stratton* v. *Stratton,* 239 U. S. 55, 36 S. Ct. 26, 60 L. ed. 142; *Fisher* v. *Perkins,* 122 U. S. 522, 7 S. Ct. 1227, 36 L. ed. 1192.

Even before the County Court's judgment became final, subject only to reversal or modification upon appeal, that court having first acquired jurisdiction was entitled to proceed.

Federal courts have no original probate jurisdiction *in rem* in administration of decedents' estates and cannot by entertaining jurisdiction of a suit against an administrator draw to themselves possession of the *res* or invest themselves with authority to determine claims against it. *Byers* v. *McAuley,* 149 U. S. 608, 13 S. Ct. 906, 37 L. ed. 867; *In re Broderick's Will,* 21 Wall. 503, 22 L. ed. 599; *Garzot* v. *Rios de Rubio,* 209 U. S. 283-302, 28 S. Ct. 548, 52 L. ed. 794; *Farrell* v. *O'Brien,* 199 U. S. 89, 25 S. Ct. 727, 50 L. ed. 101; *Smith* v. *Jennings, et al.* (C.C.A. 5th), 238 Fed. 48; *Kieley* v. *McGlynn,* 21 Wall. 503, 22 L. ed. 599.

Where the Probate Court orders an administrator to make a sale, the entire matter is within the jurisdiction of that court and the federal court may not enjoin the act, even though the judgments of the Probate Courts were fraudulently obtained and without jurisdiction and actions were pending to set aside the judgments of the Probate Courts. *Evans* v. *Gorman* (C.C.A. Ark. 1902), 115 F. 399. See, also, *Smith* v. *Jennings, et al.*, 238 Fed. 48.

Where a state court of competent jurisdiction has acquired jurisdiction over property long prior to the application for the appointment of a receiver in the federal court, any attempt on the part of the latter court to restrain or interfere with the enforcement of its judgment is said to be a palpable violation of this section, and also in violation of the rule of comity which universally obtains between courts of concurrent jurisdiction. *Dodds* v. *Palmer Mountain Tunnel Co.* (C.C. Wash. 1911), 188 F. 447.

As it is the settled law of Nebraska that the County or Probate Court has original and exclusive jurisdiction in the probate of a will, and the distribution of the estate therein, and that its judgment and order in such matter is final and conclusive unless appealed from, the federal court can take no step that would interfere with the administration and distribution of an estate in course of administration in such court. *Freeney* v. *First Nat. Bank of Plattsmouth* (C.C. Neb. 1882), 16 F. 433.

The Federal District Court has no supervisory power over the state courts either by injunction or otherwise. *Peck* v. *Jenness*, 7 How. 612, 12 L. ed. 841.

The Circuit Court should dismiss for an injunction, when the same title is in litigation in a state court of con-

current jurisdiction. *Orton* v. *Smith,* 18 How. 263, 15 L. ed. 393.

A party can ask no greater relief in equity in the courts of the United States than he could obtain were he to resort to the state courts. If in the latter courts equity would afford no relief, neither will it in the former. *Ewing* v. *St. Louis,* 5 Wall. 413, 72 U. S. 808, 18 L. ed. 657; *Blythe* v. *Hinckley* (Cal. 1899), 19 S. Ct. 497, 173 U. S. 501, 43 L. ed. 783; *Sutton* v. *English,* 246 U. S. 199, 38 S. Ct. 254, 62 L. ed. 664.

(B) Because the action was not local under 28 U.S.C.A., Secs. 116-118.

The surety had no lien upon the decedent's estate by contract or otherwise. It was not answerable for the personal acts of E. A. Kelleam as distributee or claimant. E. A. Kelleam as administrator was never served with process. (R. 52-53-95.) The surety did not seek to establish a lien or interest in any part of decedent's estate, but to have the distributees, Kelleam and Southard, account to the half-blood claimants. The terms of the decree show no relief *in rem* awarded the surety. Relief granted was *in personam*—that the distributees account to the half-blood claimants. (R. 88-92.)

Both the Second and Fifth Circuit Courts of Appeal have held such a suit to be local. *Wilson* v. *Beard* (C.C.A. 5th, N. Y.), 26 Fed. (2d) 860; *Findlay* v. *Florida East Coast Ry. Co.* (C.C.A. Fla. 1934), 68 F. (2d) 540, aff. (D.C. 1933) 3 F. Supp. 393, and cert. den. (1934) 54 S. Ct. 629, 292 U. S. 623, 78 L. ed. 1478.

The jurisdiction to enforce a lien given by this section means a lien existing anterior to the suit and not one caused by the institution of the suit itself. *Dormitzer*

v. *Ill., etc., Bridge Co.* (C.C.A. Mass. 1881), 6 F. 217; *Albert* v. *Bascom* (D.C. Tex. 1917), 245 F. 149.

A creditor cannot, where he was given no lien by contract, justify maintenance of suit in District Court other than in district of residence on ground that it was to enforce a lien upon specific personal property in the district. *Bank of Commerce & Trust of Richmond, Va.,* v. *McArthur* (D.C. Fla), 248 F. 138; *Vidal* v. *South American Securities Co.* (C.C.A. N. Y. 1922), 276 F. 855; *Shainwald* v. *Lewis* (D.C. Neb.), 5 F. 510, affirmed 2 S. Ct. 385, 108 U. S. 158, 27 L. ed. 691.

(C) Because there was no diversity of citizenship between the real parties in interest as required by 28 U.S.C.A., 111-112.

The court below in its decree assumed authority in what it treated as a local action upon non-resident service where there was no complete diversity of citizenship;

1. To vacate a decree of heirship.

2. To direct an accounting.

3. To determine personal liability of an administrator upon a judicial bond without any service upon the administrator.

4. To establish and foreclose a lien to satisfy an accounting not concluded.

5. To vacate conveyances without service upon the grantees.

6. To void a judgment of the County Court determining the same issue.

7. To appoint a receiver for a decedent's entire estate consisting of real and personal property where no proof is offered to show its situs within the state or district.

Questions of jurisdiction and venue were carefully preserved in the record. (R. 53-54-60-61-65-66-67-68-96-122-123.) To avoid possibility of waiver defendants stood on their pleas to jurisdiction at the trial. (R. 123.)

The relief sought and granted was general legal and equitable relief—in no manner limited to establishing and foreclosing a lien. There was no complete diversity of citizenship between the opposing litigants and no definite proof of either the citizenship or residence of one of them.

(1) *The parties should be aligned in accordance with their actual interests to test jurisdiction. Mitchell* v. *Maurer,* 293 U. S. 237, 55 S. Ct. 162, 79 L. ed. 338.

This case is in point also on the question of authority to appoint the receiver.

See, also, the following additional cases: *Berg* v. *Merchant,* 15 F. (2d) 990, holding that in a will contest heirs at law are indispensable parties and where no *complete* diversity of citizenship existed a demurrer was properly sustained, and *Asher* v. *Bone, et al.,* (C.C.A. 9th), 100 F. (2d) 315; *Irwin* v. *Mo. Valley Bridge and Iron Co.,* 19 F. (2d) 300, 48 S. Ct. 36, 275 U. S. 540, 72 L. ed. 415; *Backer* v. *Levy,* 82 F. (2d) 270; *U. S.* v. *Bean,* 253 F. 1; *Simon* v. *Hine, et al.,* 78 Okl. 224, 190 P. 264; *Simon* v. *Shaffer,* (D. C. Okl.), 11 Fed. Supp. 450; *Southwestern Bell Telep. Co.* v. *State,* 75 Okl. 42, 181 P. 487, citing 16 Cyc., p. 181; Stories' Eq. Pl., Sec. 271; *Hagan* v. *Walker,* 14 How. 29, 14 L. ed. 312; *Greer, Mills & Co.* v. *Stroller,* 77 F. 1; *Mallow* v. *Hinde,* 6 L. ed. 599; 12 Wheat. 193.

Presence of the defendant in a suit *in personam* is an essential element of the jurisdiction of a Federal Dis-

trict Court, and in the absence of this element the court is powerless to proceed to an adjudication. *Employers Re-insurance Corp.* v. *Bryant*, 299 U. S. 374, 57 S. Ct. 273, 81 L. ed. 289.

The Act of March 3, 1875 (18 Stat. at L. 472, chap. 137, sec. 5; Judicial Code, sec. 37, U.S.C.A. title 28, sec. 80), provides that if in any suit commenced in a Federal District Court it shall appear to the satisfaction of the court that such suit does not really and substantially involve a dispute or controversy properly within its jurisdiction, or that the parties to such suit have been improperly or collusively made or joined for the purpose of creating a cognizable case, the court shall proceed no further therein, but shall dismiss the suit. *McNutt* v. *General Motors Accept. Corp.*, 298 U. S. 178, 56 S. Ct. 780, 80 L. ed. 1135.

Constructive service can only bring non-residents within the jurisdiction of a court, where there is a *res* in the control of the court, and then only for the purpose of adjudicating his rights, if any, to the *res*. *First Nat. Bank of Rome, Ga.* v. *First Nat. Bank of Jasper, Fla.* (C.C.A. Fla. 1920), 264 F. 83, and *First Nat. Bank of Rome, Ga.* v. *Bank of Jasper* (C.C.A. 1920), 264 F. 88, certiorari granted, *First Nat. Bank of Jasper* v. *State Bank of Rome, Ga.* (1920), 41 S. Ct. 7, 254 U. S. 622, 65 L. ed. 443, and affirmed, *Bank of Jasper* v. *First Nat. Bank of Rome, Ga.* (1922), 42 S. Ct. 262, 258 U. S. 112, 66 L. ed. 490; *Clarke* v. *Boysen* (C.C.A. Wyo. 1930), 39 F. (2d) 860, cert. denied (1930), 51 S. Ct. 75, 282 U. S. 869, 75 L. ed. 769.

(2) *The burden of proof of the jurisdictional facts was upon plaintiff.*

The Circuit Court concedes the allegation of residence in the pleadings and evidence is not equivalent to an allegation of citizenship in the state, but asserts where the averment of residence was intended to mean and reasonably construed must be interpreted as meaning that the party is a citizen of a state, it is sufficient. But in analyzing the facts the court limits its review to the evidence regarding residence of the *surety* and the *petitioners* herein. The *citizenship of the half-blood claimants was equally material as the cases cited above clearly show.* The allegation as to citizenship of all except Kelleam Hall is that they "* * * *are residents and citizens of the State of Arkansas and the State of Oklahoma, the exact addresses of each this plaintiff does not know and cannot give* * * *." (R. 6.) The proof was that "all * * * *half-brothers and sisters live in either Oklahoma, Arkansas or California.*" (R. 119.) The allegation of the petition was traversed in the answer. (R. 62.)

The court's findings were generally that there was a diversity of citizenship between the Maryland Casualty Company and the defendants and cross-petitioners (R. 85) but specifically that the residences of the half-blood claimants were Milwaukee, Wisconsin, Yorbalinda, California, Santa Anna, California, Long Beach, California, Fort Smith, Arkansas, Galveston, Texas, Los Angeles, California, Alhambra, California, Waldron, Arkansas, Fayetteville, Arkansas, Blanchard, Oklahoma, Amarillo, Texas, Oklahoma City, Oklahoma. Robert Kelleam's residence was found merely to be "Texas" and there was no finding as to the residence of Kelleam Hall. These residences are in the main supplied by counsel who drew the journal entry. They were not established by any evidence.

In view of this confused state of the record, this case cannot be brought under the rule in *Sun Printing and Publishing Assn.* v. *Edwards*, 194 U. S. 377, 24 S. Ct. 696, 48 L. ed. 1027.

Under the Oklahoma law the answer put in issue the allegations of jurisdictional as well as non-jurisdictional facts. 12 O. S. A. 269 (R. L. 1910, sec. 4742). The answer does not waive such questions even where not traversed, but they may be raised at any stage of the proceedings. *Antene* v. *Jensen*, 47 Okl. 352, 148 Pac. 727; *Blake* v. *Metz*, 136 Okl. 150, 276 Pac. 765; *Zahn* v. *Obert*, 60 Okl. 118, 159 Pac. 298.

The cases of *Anderson* v. *Watt*, 138 U. S. 694, 11 S. Ct. 449, 34 L. ed. 1078, and *Desmare* v. *U. S.*, 93 U. S. 605, 23 L. ed. 959, do not support the Circuit Court's statement that proof of residence at a given place shifts the burden of proof as to citizenship. The point appears not to have been considered in either case. On the contrary in *Anderson* v. *Watt* the following language appears:

> "Under the Act of March 3, 1875, determining the jurisdiction of circuit courts of the United States (18 Stat. 472), the objection to the jurisdiction upon a denial of the averment of citizenship is not confined to a plea in abatement or a demurrer, but may be taken in the answer, and the time at which it may be raised is not restricted. Although the averment as to citizenship may be sufficient, yet, if it appear that that averment is untrue, it is the duty of the circuit court to dismiss the suit; and this court, on appeal or writ of error, must see to it that the jurisdiction of the circuit court has in no respect been imposed upon. *Morris* v. *Gilmer*, 129 U. S. 315, 325 (32: 690, 693); *Nashua & L. R. Corp.* v. *Boston & L. R.*

Corp., 136 U. S. 356, 374 (34: 363, 367); *Cameron* v. *Hodges*, 127 U. S. 322, 325 (32: 132, 133).

"Although the Fourteenth Amendment declares all citizens of the United States to be citizens 'of the State where they reside,' yet as the jurisdiction of the Circuit Court is limited in the sense that it has none except that conferred by the Constitution and laws of the United States, and the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears, it is essential that in cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctively and positively averred in the pleadings, or should appear affirmatively with equal distinctness in other parts of the record. It is not sufficient that jurisdiction may be inferred argumentatively from the averments. *Robertson* v. *Cease*, 97 U. S. 646, 649 24: 1057, 1058); *Brown* v. *Keene*, 33 U. S. 8 Pet. 112, 115 (8: 885, 886). It was therefore held in *Robertson* v. *Cease, supra; Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237 (30: 380); *Menard* v. *Goggan*, 121 U. S. 253 (30: 914), and other cases, that the averment that the parties to a cause were 'residents' in different states, respectively, was not enough. * * *"

IV. The writ of certiorari should issue.

From the records in this case it is clear that the District Court is proceeding with the sanction of the Circuit Court in the exercise of an assumed jurisdiction not vested in it by law under circumstances which bring the federal and state courts into direct conflict. The cases heretofore cited show the Circuit Court's opinion is contrary to decisions of this court and of other circuits upon the same questions and to the very case of *Anderson* v. *Watt, supra,* which it purports to follow.

Because of the grave consequences that will result from an attempted enforcement of the federal court judgment, in view of the prior jurisdiction and adjudication of the state court, it is respectfully submitted that the writ of certiorari should issue under 28 U.S.C.A., para. 347 (Jud. Code 240), and the case of *Forsyth* v. *Hammond*, 166 U. S. 506, 41 L. ed. 1095, 17 S. Ct. 665, and *Roberts* v. *Lewis*, 144 U. S. 653, 36 L. ed. 579, 12 S. Ct. 781. In the latter case, as here, allegations of citizenship in the petition were put in issue by the answer; the record showed no proof of finding upon this essential point, upon which the jurisdiction of the Circuit Court depended. On appeal, conformable to the provisions of the then federal law, jurisdiction was assumed and the cause remanded with directions either to dismiss or set aside the verdict. The right to the writ is further supported by *Lau Ow Bew* v. *United States*, 144 U. S. 47, 36 L. ed. 340, 12 S. Ct. 517; *American Construction Co.* v. *Jacksonville, etc., R. Co.*, 148 U. S. 372, 13 S. Ct. 758, 37 L. ed. 486.

Respectfully submitted,

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August 14, 1940.

APPENDIX I.

	Record Page
Petition for Letters of Administration to the County Court of Creek County	22-96
Administrator's Bond	25-96
Amended Petition for Approval of Final Account, and for Decree Determining Heirship and Distribution of Estates	43-96
Notice by Publication	97-8
Decree of the County Court approving final account of administrator, determining heirs and providing for distribution of estate	46-96
Order of Final Discharge and Releasing Administrator and Bond from further liability	97-100
Petition to Vacate Decree filed in the County Court	123-4, 101
Amended Petition to Vacate Decree of the County Court, filed therein on Nov. 16, 1937	125-8, 97
Special Appearance of Maryland Casualty Co.	101
Demurrer pleading, *inter alia,* limitations and laches in the County Court	141-2
Judgment of the County Court sustaining demurrer and dismissing proceedings to vacate decree	102
Half-blood claimants' Record of Appeal to District Court	102
Bill of Complaint of Maryland Casualty Company, filed in United States District Court for the Northern District June 8, 1938	5
Recitation showing chancery subpoena served on Francis E. Kelleam same day	93

Answer and Cross-Petition of half-blood claimants 11

Chancery Subpoena to Nell Southard and J. R. Southard, Jr., and service (recitation regarding) 95

Order for service on E. A. Kelleam and Joe E. Kelleam, non-residents, and service (recitation regarding) 95

Recitation of service in the State of Arizona 95

Recitation regarding constructive service 95

Judicial findings on residence and citizenship (except Kelleam Hall) 78-79

Plea to the venue and jurisdiction 54-55

Order overruling same 60

Motion to Strike Cross-Petition for Want of Jurisdiction 61

Order overruling 67

Answers pleading want of venue and jurisdiction 61-66

Answer to Cross-Petition pleading jurisdiction and venue 68

Objection to Jurisdiction and Venue at the trial and Order Overruling 96-122

Decree of the United States District Court 88-92

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SEP 30 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 349.

E. A. KELLEAM, Nell Southard, Joe E. Kelleam, and Joe R. Southard, Jr., *Petitioners,*

vs.

MARYLAND CASUALTY COMPANY of Baltimore, Maryland, a Corporation, Mrs. Ethel Riddler, Mrs. Dorothy Payne, J. K. Perkins, Mrs. F. Bates, Glen Perkins, Bessie Mathews, Mrs. Elouise Kulp, Leggette Hall, Lamar Hall, Marguerite Bradley Kelleam, Mary Kate Hall, Kelleam Hall, Clifford Kelleam, Kathleen Kelleam, Dr. Fannin Kelleam, Francis Kelleam, Mrs. Jimmie Kelleam and Robert Kelleam, *Respondents.*

REPLY TO THE BRIEF OF RESPONDENTS ON PETITION FOR CERTIORARI.

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INDEX

Subject Index.

Statement: Respondents evade the issues which involve questions of conflicting jurisdictions of state and federal courts..... 1

Argument:

I. Respondents' contentions applied invalidate the judgment of the federal court complained of.... 4

II. Reply to Points I to IV of cross-petitioners.... 5

III. Reply to Points I-III of respondent Maryland Casualty Company..... 9

IV. Conclusion: The decree involves state and federal courts in direct conflict which this court alone can settle..... 13

AUTHORITIES CONSIDERED:

Baker vs. Schofield, 37 S. Ct. 333, 243 U. S. 114, 61 L. ed. 526..... 7

Byers vs. McAuley, 149 U. S. 608, 37 L. ed. 867.. 11

Hewitt vs. Hewitt, 17 F. (2d) 716..... 12

Insurance Co. vs. Harris, 97 U. S. 331, 24 L. ed. 959..... 7

McDougal vs. Black Panther Oil & Gas Co., 273 Fed. 113 (Okl. 1921)..... 7

Stuart vs. Hayden, 169 U. S. 1, 42 L. ed. 639, 18 S. Ct. 274..... 8

Walton vs. Williams, 5 Okl. 642, 49 P. 1022.....8, 12

STATUTES CONSIDERED:

12 Okla. Stat. Ann., Sec. 1108..... 8

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REPLY TO THE BRIEF OF RESPONDENTS ON PETITION FOR CERTIORARI.

STATEMENT.

Respondents evade the issues which involve questions of conflicting jurisdictions of state and federal courts.

In submitting petition and brief for certiorari a diligent effort was made to avoid statements and arguments regarding issues which were properly before the County

Court of Creek County and determined by its judgment prior to the institution of the proceeding in the national courts which is brought under review herein. The question presented for consideration in the federal court was not whether the prior judgment of the County Court conformed to the law but whether that court had in fact adjudicated the controversy in the exercise of jurisdiction vested in it under the Constitution and laws of the State of Oklahoma. Respondents in their briefs persistently ignore the question of jurisdiction upon which petitioners here rely, and the judgment of the County Court, and seek to have the case here considered upon its merits as though it had never been tried in a state court having exclusive original jurisdiction.

They studiously avoid any consideration of the final judgment of the County Court wherein that Court in proceedings initiated by the cross-respondents reviewed its own decree and refused to vacate the prior decree of distribution upon grounds of either fraud or error of law. That judgment unless vacated or set aside upon appeal (and it is conceded that the judgment has never been so set aside) determines both the law and facts of the case contrary to the very contentions respondents herein advance. It is not urged that it was irregularly or fraudulently obtained. The question now, therefore, is not as to the law or facts in the case, but whether the jurisdiction of the state court and its mandate shall be respected by the parties and the national tribunals. Analysis of the record shows clearly that the collusive effort of the surety upon the administrator's bond and the claimants who were defeated in the state courts to obtain a new adjudication of the identical controversy in the national courts is an effort merely to retry litigation theretofore conclusively determined by a court of competent jurisdiction.

The briefs filed herein may reveal some conflict in the Oklahoma authorities upon some of the questions of law before the County Court (assuming the facts there were what counsel say they were, which is not conceded), but none of the cases cited by respondents even remotely indicate that the judgment of a court is void because the court did not adopt the view of the losing side as to the law. The judgment of the County Court refusing to vacate the decree of heirship may be sustained on other wholly valid grounds than those suggested, such as laches and limitations. The statutes of Oklahoma heretofore cited by us prescribe a time within which an attack may be made upon the decree of a probate court and the procedure for such an attack. Those who fail to proceed in the time and manner prescribed are barred. The record affirmatively discloses that the complaining claimants even though not personally notified of the pending proceedings in the County Court prior to the entry of the decree of distribution, had *actual* notice of those proceedings as well as notice by publication required by statute in ample time to have asserted their claims, but did not do so. The only evidence upon the question of actual notice is that of Ethel Riddler, respondents' own witness, who testified on June 21, 1939 (R. 120):

> "My sister heard that the estate had been administered and told me. That was two years ago last October."

The date so fixed was prior to the decree of distribution. It seems proper to assume that the County Court in considering the petition to vacate gave effect to the statutory law of the state and properly concluded that any right to attack the decree of distribution had been forfeited by laches and limitations.

What is said is in no sense intended to concede charges repeated with such tedious regularity to the effect that the decree of distribution was contrary to law and obtained by fraud. As heretofore pointed out, the statutes of the State of Oklahoma did not require notice to anyone of Dr. Kelleam's petition to have himself appointed administrator of the estate; notice by publication was all that was required preceding a valid distribution. Both the law and the facts regarding the ancestral nature of the estate was submitted fully to the County Court (R. 114) and the question by it determined. Its adjudication of this question was never appealed and became final and is entitled to the same presumptions of verity and effectiveness as the judgment of any other court of general jurisdiction. Whether right or wrong, that decision became the law of this case. It was binding upon the parties in the federal court as well as in the state courts.

ARGUMENT.

I.

Respondents' contentions applied invalidate the judgment of the federal court complained of.

If it be the law that no judgment can be valid without personal as well as constructive notice, and that any judgment entered without personal notice is so wholly void that it may be brushed aside by any court in any proceeding, consideration must be given to the effect of the application of such rule in the case at bar. It is undisputed that the judgment appointing a receiver herein was entered by agreement between the respondents and without either actual or constructive notice to any of the petitioners. The decree attempts to determine the lia-

bility of Dr. E. A. Kelleam as administrator upon his official bond without ever serving process upon him or making him party in his capacity as administrator or his appearance as such. Under the terms of the bond the surety was only chargeable for his official acts. (R. 25.)

The decree in the case at bar also attempts to vacate conveyances to *Maud Grady* and *Ophelia E. Kelleam* (R. 92; 99.), who are not parties to the record, without notice to them of any kind. If the original judgment of the County Court is void for failure to give personal notice that herein complained of is void for failure to give any notice.

The surety company attempted, it admits, to compel Dr. Kelleam, whom the County Court had twice determined lawfully entitled to that portion of the estate distributed to him, to turn over that estate to some of its representatives. To punish him for treating the orders of the County Court as binding it secretly obtained the appointment of a receiver by agreement with his adversaries. It delayed issuing process for an extended period, using the receivership, in a futile attempt to coerce him into an appearance in the federal court. These observations go to the merits but seem justified in view of the frequent imputations of fraud in respondents' brief, for he who comes into a court of equity must come with clean hands.

II.

Reply to Points I to IV of Cross-Petitioners.

The cross-petitioners advance four propositions which may be briefly considered and answered:

1. That the U. S. District Court had authority to vacate the decree of the County Court.

Under this caption an attempt is made to reargue the identical propositions which were presented for adjudication of the County Court and by it determined prior to the institution of the proceedings in the federal court. Of course, none of these propositions are in point to the issues here for none of the cases involved a similar state of facts or like questions of law. The question here is whether after a case has been tried in a court of original jurisdiction and the judgment therein rendered appealed conformable to the local practice, the same issue may be tendered and determined in the national courts in an original proceeding in equity instituted there.

2. It is next argued that this suit was not an attempt by the federal court to assume jurisdiction over the matters presented in the County Court nor an attempt to review upon appeal the decision of the County Court.

This proposition merely advances questions of fact and is answered directly by consideration of the record. It is true that the proceeding was not one to review upon appeal the decision of the County Court but decidedly fallacious to say the proceeding was not designed to have the federal court assume jurisdiction over matters theretofore considered and determined by the County Court. The County Court determined the nature of the estate and identity of the heirs and ordered distribution to them and exonerated the bond; upon proceedings to vacate upon grounds of fraud it rendered judgment of dismissal which, for the purpose of this case, became final. The citation of opposing counsel to the County Court's decision upon petition to reopen is to the findings of fact and conclusions of law of the trial court (R. 85) rather than to the evidence in the record which shows without

dispute exactly what the judgment of the County Court was. (R. 143, 145, 179 and 102.) The statement in the brief of respondent-cross-petitioners at page 10, regarding the jurisdiction of the County Court, is misleading. While the County Court may not have jurisdiction to set aside conveyances or impress a lien, it did have jurisdiction though its administrator to take charge of the assets of decedent's estate and by its decree to determine to whom these belonged and order distribution. This jurisdiction it had assumed and exercised, and when these questions were determined, there was no occasion for setting aside conveyances or impressing liens by any court.

"As a general rule in the state and federal courts," say opposing counsel, "it is not the first court which takes jurisdiction of a matter that decides a case, but rather the first court reaching a ruling upon the merits which becomes *res adjudicata.*" Supporting the rule they cite *McDougal* v. *Black Panther Oil & Gas Co.*, Okla. 1921, 273 Fed. 113, and *Insurance Company* v. *Harris,* 97 U. S. 331, 336, 24 L. ed. 959.

Applying the stated rule to the facts it will be found, however, that the County Court had decided the case before institution of this cause in the federal court and these decisions support petitioners here in their contention.

Under this caption opposing counsel further contend that facts determined by the trial court and upheld by the Circuit Court will not be re-examined upon appeal, and cite *Baker* v. *Schofield,* 37 S. Ct. 333, 243 U. S. 114, 61 L. ed. 626. Analysis of the rule announced in that decision will show it qualified by the words "unless it is clear that their conclusion was erroneous." The same

qualification is recognized in *Stuart* v. *Hayden,* 169 U.S. 1, 42 L. ed. 639, 18 S. Ct. 274, which they also cite, the exact qualifying words being "unless it clearly appeared that they erred as to the effect of the evidence." The only question involved here is as to the effect of the evidence for it is not in conflict. The petitioners stood upon a demurrer to the evidence and jurisdictional defenses at the trial and the evidence as to the jurisdictional facts is not in conflict.

3. It is asserted the action was local and not *in rem* and under this caption the statement is made: "It has always been a general rule in the State of Oklahoma that a surety has a lien upon the distributed proceedings of the decedent's estate." Cited is Oklahoma Statutes Annotated, Title 12, Section 1108, which in no manner touches this point, and *Walton* v. *Williams,* 5 Okl. 642, 49 P. 1022, which involved a suit at law on a brewery employee's bond and in no manner determined a question even approximately similar to that in the case at bar. For here the question does not involve liability of the surety at all but rather jurisdiction of the national court to determine a law suit after the identical controversy had been determined by the state court.

4. It is argued under this head that there was a diversity of citizenship between the real parties in interest, but no effort is made to answer the contention that, absent proof regarding the citizenship of Kelleam Hall, there is no presumption of diversity of citizenship between the Maryland Casualty Company and him; and the further proposition that admittedly there was no diversity of citizenship between the successful and unsuccessful claimants to heirship in the County Court, who were

the real parties in interest in the proceedings in the federal court.

The surety respondent in its brief incorporates an extended recitation of what it contends the facts were in the case which the County Court adjudicated. It admits (p. 9) that on Sept. 15, 1938, the County Court sustained a demurrer to the amended petition and that the proceeding to reopen the decree of distribution was dismissed and that the case was appealed to the District Court of Creek County. The law required the appellants to prosecute this appeal to effect and without unnecessary delay and provided that unless vacated on appeal the judgment became final. It is admitted that the appeal has not been so prosecuted.

III.

Reply to Points I-III of Respondent Maryland Casualty Company.

Under point 1 the surety admits that the jurisdiction of the County Courts in probate proceedings is exclusive, original jurisdiction. An attempt is made to circumvent the proposition, however, by a counter proposition not involved in this case at all, regarding validity of a judgment of the County Court obtained by fraud. It is argued that the fraud consisted in failing to give personal notice to claimants who admit they had personal notice, in addition to notice by publication, which it is admitted was given. Then it is asserted: "No one can read the record * * * and find that the half-blood heirs had their day in court until the decision of the trial judge in the instant case."

Of course, this last statement is clearly refuted by the admission at page 9 that the half blood heirs them-

selves instituted and tried this identical law suit in the County Court. It can hardly be doubted that where notice by publication is all that is required and where they had in addition to this notice actual notice and did thereafter themselves enter their appearance in the County Court and litigate the question of the regularity of the previous judgment, they had had their day in court not once but twice, and a statement to the contrary is clearly unwarranted. They say the fraud complained of prevented a fair hearing, but no fraud is alleged or established incident to the prosecution of their own suit to vacate the judgment.

If failure to allege facts as an adversary contends they are by pleadings, and failure to give personal notice where notice by publication only is prescribed by law, constitutes fraud and invalidates a judgment absolutely, few judgments indeed rendered in the courts of the nation on constructive service can ever be upheld. Moreover, since the address of Kelleam Hall has not yet been established in the record, it is difficult to conceive how a valid judgment involving his interest can ever be obtained. Dr. Kelleam can hardly be charged with fraud in failing to do that which it appears Kelleam Hall's own counsel have not been able to do so far in this litigation. A fair inference from the circumstance that his address has not yet been established is that his counsel have not yet notified him of the pendency of this suit wherein he is nominally a party.

None of the cases cited under this caption involved circumstances such as here, nor the liability of a surety upon an administrator's bond after *two* judgments of exoneration had been entered by the very court to which

the administrator, principal upon the bond, had fully accounted.

Under point 2 the surety company lamely suggests that its appearance in the County Court may have been special. The question here is whether the surety had been exonerated by a decree of the County Court discharging the administrator and exonerating the bond. Since the liability of the surety was secondary only, and a discharge of the principal released it from any possible obligation, it is clear that the response to this point is merely begging the question. But the contention does reveal a strange reluctance on part of the surety to be exonerated.

Under their discussion of point 3, the surety quotes from *Byers* v. *McAuley,* 149 U. S. 608, 37 L. ed. 867, the following:

> "Where the estate of a deceased is ready for distribution, but no adjudication has been made as to the distributees, the Circuit Court can entertain jurisdiction in favor of citizens of other states to determine and award their shares in the estate."

And asserts: "This case is not in point and even goes so far as to hold in support of our contention." But let us see. The court limits the rule to cases where "no adjudication has been made as to the distributees."

Assuredly it cannot be contended that the County Court had made no adjudication as to the distributees in this case. And the quotation further reads: "The circuit court can entertain jurisdiction in favor of citizens of other states to determine and award their shares in the estate." But in the case at bar, the court attempted to exercise jurisdiction *where admittedly there was no*

complete diversity of citizenship between the contending claimants.

Just what counsel for the surety company contends the trial court is attempting to do is not clear, for they say it "is in no manner trying to oust the probate court of jurisdiction, or disturb the administrator in his possession as administrator." This assertion is answered by an analysis of the decree itself, which shows the federal court attempting to do identically what the probate court had already done. Frequent reference is made to the right of the federal court to deprive a party of the benefit of a decree of a state court *fraudulently* obtained. This jurisdiction is not doubted where diversity of citizenship and the jurisdictional amount invest the federal court with jurisdiction and the question of the finality and binding force of the judgment has not theretofore been determined.

They cite *Hewitt* v. *Hewitt,* 17 F. (2d) 716, to the rule that:

> "A fiduciary relation exists between an administrator and the heirs of the estate."

But again we emphasize the fact that the administrator has never been made party to the record; that they have attempted herein to obtain judgment condemning his official acts without making him in his official capacity a party. They cite many cases to the rule that the surety had an equitable claim against the property, but analysis of those cases will show none to involve similar facts. *Walton* v. *Williams,* 5 Okl. 262, 43 P. 1028, the only local case cited, as above noted involved a suit at law upon the private bond of an agent for Pabst Brewing Company of Milwaukee, Wisconsin. While it was

therein determined, in accordance with the statutes of Oklahoma, that a surety might prosecute an action to obtain indemnity against the debt or obligation for which it is bound before the debt is due and without being first paid or satisfied, this remedy is limited to cases where grounds exist upon which an order of attachment may issue. Of course, no order of attachment can issue in the case at bar after an adverse judgment upon the issues by a court having jurisdiction, for presumably that judgment is valid. That a receiver was appointed for property in the federal court at the instance of the bond company and without notice to the real parties in interest in an action where to justify, a presumption of the invalidity of two judgments of the state court was indulged, emphasizes the novel features of the case at bar.

The remaining points discussed by the surety deal with questions of residence and citizenship. It is asserted by respondent that diversity of citizenship was established to the satisfaction of the trial court. Of course the record upon the point must support the court's findings and even opposing counsel's analysis of it is convincing that the court's conclusions are contrary to the undisputed evidence. Cases heretofore cited show clearly that the federal courts have never adopted a rule that their jurisdiction may be supported by presumptions or conclusions rather than the affirmative evidence.

IV.

Conclusion.

The decree involves state and federal courts in direct conflict which this court alone can settle.

In conclusion, it is respectfully urged that this case is clearly one of an unusual nature and of general public

importance, for it involves questions not heretofore directly determined in any court, as well as conclusions directly contrary to previous adjudications of this court and other circuit courts as demonstrated by our brief. The propositions contended for by respondents and determined in their favor by the courts below will, if they receive general judicial sanction, open an avenue whereby all lawsuits pending on appeal in state tribunals may be transferred to the federal court, provided only that the requisite jurisdictional amount and a cooperative nonresident surety upon a judicial bond may be involved. The extension of bills *quia timet* in equity to situations such as that presented by the record is to be viewed with grave concern because of the absence of judicial precedent or statutory enactment governing such proceedings. If a surety upon a judicial bond may under the guise of seeking exoneration have the proceeding transferred to the federal court, and thereby invest such courts with jurisdiction to vacate decrees theretofore rendered and to probate estates, it will with equal reasonableness be argued that all other state judicial proceedings involving a surety's liability may similarly be reviewed in the national courts. Complicated and unusual incidental questions will arise: If the right exists after two judgments of exoneration in the state court, how long does it continue, and when will judgments of state courts become immune from such attacks? If the right for such review exists, when does it originate? Immediately upon the execution of the bond or thereafter? And what rules determine its period of vitality? May the remedy be resorted to again and again in every court until a judgment is obtained that conforms to the conscience or scruples or caprice of the surety? Have prior judgments no effectiveness and courts no power to finally settle such

issues as the *secondary* liability of a surety, even after they have fully "exonerated" the principal?

And the far more important question is here presented. How shall the mandates of state and federal courts divergently deciding the same issues be reconciled and made effective? Titles to valuable real and personal property depend upon which decree is valid, that of the County Court determining one set of claimants to be the heirs, or that of the federal court admitting another set to heirship. The decree of the federal court attempts to penalize the administrator by surcharging liability upon his bond for doing precisely what the court by which he was appointed and of which he was an officer directed him to do. In the circumstances only this court can correct what appears to be an obvious departure from the accepted and usual course of judicial proceedings.

It is respectfully submitted, therefore, that certiorari should issue.

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Of Counsel.

Sept. 26, 1940.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 349.

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM AND JOE R. SOUTHARD, JR., PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, A CORPORATION, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, ET AL., RESPONDENTS.

BRIEF OF PETITIONERS.

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INDEX.

Subject Index.

BRIEF OF PETITIONERS.

Opinion Below and Jurisdiction..... 1

Statement of the Case..... 2

Specifications of Error..... 12

Summary of the Argument..... 14

Argument and Authorities..... 17

I. Jurisdiction of the County Courts of Oklahoma in probate matters is exclusive original jurisdiction..... 24

II. That jurisdiction was duly invoked and exercised prior to the institution of the instant proceeding as to both the subject matter and the parties..... 28

III. The judgment of the County Court refusing to vacate the decree was in conformity to local law..... 31

IV. It was the duty of the federal court to sustain the plea of the petitioners to dismiss the bill of the surety for want of jurisdiction at the trial:

(a) Because the action, if any existed, was ex contractu and the court had no jurisdiction of the parties to the bond..... 35

(b) The federal court had no jurisdiction of the asserted cause of action because of the prior judgment and decree of the state court.... 38

(c) The U. S. District Court of the Northern District had no venue of the parties..... 45

(d) The suit was not a local action under 28 U. S. C. A., Secs. 116-118..... 46

(e) The bill stated no cause of action within either the legal or equitable jurisdiction of the court..... 49

V. It was the duty of the court to sustain motion to dismiss both the bill and the cross-petition at the trial for want of jurisdiction for:

(a) The burden was upon the persons asserting jurisdiction in the federal court for diversity of citizenship to establish diversity, which was not done..... 52

(b) There was no complete diversity of citizenship between the real parties in interest as required by 28 U. S. C. A. 111-112..... 57

(c) The relief prayed and granted was in personam against nonresidents of the Northern District and was beyond the jurisdiction of the court..... 60

1. The petitioners were neither inhabitants of nor found within the Northern District in which the suit was brought and who did not voluntarily appear and as to them the decree is void..... 60

2. Because jurisdiction was predicated upon diversity of citizenship and neither plaintiff nor any defendant was a resident of the district, and objection was made by the petitioners..... 63

Conclusion..... 65

Appendix..... 66

Table of Cases.

Abbott vs. Ickes (1935), 56 S. Ct. 132, 296 U. S. 612, 80 L. ed. 434..... 65
Adair vs. Montgomery, 74 Okl. 21, 176 P. 911..... 27
Albert vs. Bascom, 245 F. 149.....48, 64
Anderson vs. Watt, 138 U. S. 694, 11 S. Ct. 449, 34 L. ed. 1078..... 56
Antene vs. Jensen, 47 Okl. 352, 148 P. 727..... 55

Bank of Commerce & Trust, etc., vs. McArthur, 248 F. 138..... 48
Barrett's Estate, 181 Okl. 262, 72 P. (2d) 482..... 26
Blake vs. Metz, 136 Okl. 150, 276 P. 765..... 55
Blythe vs. Hinckley, 19 S. Ct. 497, 173 U. S. 501, 43 L. ed. 783..... 52
Bryan vs. Seiffert, 185 Okl. 496, 94 P. (2d) 526..... 26

Calkin vs. Wolcott, et al., 77 P. (2d) 96, 182 Okl. 278..... 31
Chase vs. Wetzlar, 225 U. S. 79, 32 S. Ct. 659, 56 L. ed. 990..... 38
County of Scotland vs. Wm. Hill, 132 U. S. 107, 10 S. Ct. 86, 33 L. ed. 261..... 40
Creager vs. P. F. Collier & Son Co., 36 F. (2d) 781.. 37

De Graffenreid vs. Yount-Lee Oil Co., 30 F. (2d) 574..... 60
Denny vs. Pironi, 141 U. S. 121, 35 L. ed. 657, 11 S. Ct. 966..... 55
Desmare vs. U. S., 93 U. S. 605, 23 L. ed. 959..... 56
Dormitzer vs. Ill., etc., Bridge Co., 6 F. 217..... 48
Douglas' Estate, In re, 185 Okl. 25, 90 P. (2d) 35.... 26
Dunn vs. Ickes, 56 S. Ct. 132, 296 U. S. 612, 80 L. ed. 434..... 65

Edwards vs. Glasscock, 91 F. (2d) 625..... 58
Employers' Reinsurance Corp. vs. Bryant, 299 U. S. 374, 57 S. Ct. 273, 81 L. ed. 289..... 45
Everhart vs. Huntsville Female College, 120 U. S. 223, 30 L. ed. 623, 7 S. Ct. 555..... 55
Ewing vs. St. Louis, 5 Wall. 413, 72 U. S. 808, 14 L. ed. 657..... 52
Exendine vs. Iron, 4 P. (2d) 1035, 153 Okl. 177..... 30

Findlay vs. Florida East Coast Ry. Co., 68 F. (2d) 540..... 46
Fordham vs. Ickes (1935), 56 S. Ct. 133, 296 U. S. 612, 80 L. ed. 434..... 65
Foulk vs. Gray, 120 F. 156..... 64
Fourth Natl. Bank vs. New Orleans & C. R. Co., 11 Wall. 624, 20 L. ed. 82..... 62

Gaddies vs. Junker, 27 F. (2d) 156..... 60
Gassin vs. McJunkin, 48 P. (2d) 320, 173 Okl. 210.. 32
Gentry's Estate, In re, 158 Okl. 196, 13 P. (2d) 156.. 26

Hartford Accident & Indemnity Co. vs. Goldberg, 61 P. (2d) 704, 178 Okl. 75..... 29
Herndon vs. Ridgeway, 17 How. 424, 15 L. ed. 100.. 62
Hill vs. Ickes (1935), 56 S. Ct. 132, 296 U. S. 612, 80 L. ed. 434..... 65
Hines vs. Armstrong, 77 P. (2d) 671, 182 Okl. 344...27, 28
Houston vs. Moore, 5 Wheat. 1, 5 L. ed. 19..... 40
Hull vs. Ickes (1935), 56 S. Ct. 133, 296 U. S. 612, 80 L. ed. 434..... 65

Kan. Gas, etc., vs. Wichita Natural Gas Co., 266 F. 614..... 37

Ladew vs. Tenn. Copper Co., 218 U. S. 357, 31 S. Ct. 81, 54 L. ed. 1069..... 64
Lassig vs. Ickes (1935), 56 S. Ct. 132, 296 U. S. 612, 80 L. ed. 434..... 65

Leggett vs. Humphreys, 21 How. 66, 16 L. ed. 50.... 36
Logan vs. Hopkins, 205 P. 1095, 85 Okl. 278..... 36
Looney vs. Western Texas R. R. Co., 274 U. S. 214, 62 L. ed. 1084, 38 S. Ct. 460..... 43
Luckett vs. Delpark, Inc., 46 S. Ct. 397, 270 U. S. 495..... 64

McNutt vs. General Motors Corp., 298 U. S. 178, 56 S. Ct. 780, 80 L. ed. 1135.....49, 59
Manuel vs. Kidd, 258 P. 732, 126 Okl. 71..... 34
Metropolitan Cas. Ins. Co. of N. Y. vs. United Brick & Tile Co., 167 Okl. 402, 29 P. (2d) 771..... 36
Mitchell vs. First Natl. Bank, 180 U. S. 471, 21 S. Ct. 418, 45 L. ed. 627..... 40
Mitchell vs. Maurer, 293 U. S. 237, 55 S. Ct. 162, 79 L. ed. 338..... 60

N. O. Nelson Mfg. Co. vs. McDougal, 43 P. (2d) 399, 171 Okl. 477..... 36

O'Brien vs. Markham, 17 F. Supp. 633..... 62

Parker vs. Overman, 18 How. 137, 15 L. ed. 318.... 55
Peck vs. Jenness, 7 How. 612, 12 L. ed. 841..... 43
Penn. General Cas. Co. vs. Penn., 294 U. S. 189, 79 L. ed. 850, 55 S. Ct. 386..... 43
Putnam vs. Ickes, 78 F. (2d) 223, 64 App. D. C. 339, cert. den. (1935) 56 S. Ct. 132, 296 U. S. 612, 80 L. ed. 434..... 65

Ribon vs. R. R. Co., 17 Wall. 446, 21 L. ed. 367.... 62
Robertson vs. Cease, 97 U. S. 646, 24 L. ed. 1057.... 55
Roller vs. Murray, 234 U. S. 738, 37 S. Ct. 902, 59 L. ed. 1570..... 40

Security Trust Co. vs. Black River Nat. Bank, 187 U. S. 211, 23 S. Ct. 52..... 34
Shainwald vs. Lewis, 5 F. 510..... 48

Sharon vs. Terry, 13 Sawr. 387, 36 F. 337, 131 U. S. 40, 33 L. ed. 94, 9 S. Ct. 705 43
Shields vs. Barrow, 17 How. 130, 15 L. ed. 130 62
Simon vs. Shaffer, 11 F. Supp. 450 62
Sims vs. Billings, 162 Okl. 51, 18 P. (2d) 1084 32
Sims Estate, Appeal of, 162 Okl. 35, 18 P. (2d) 1077 32
Southwestern Surety Ins. Co. vs. U. S. Fidelity & Guaranty Co., 182 P. 522, 75 Okl. 232 36
State vs. Bachelder, 5 Minn. 223 Gil. 178, 80 Am. Dec. 410 43
State ex rel Morrell vs. Worten, 161 Okl. 130, 17 P. (2d) 424 26
Steigleder vs. McQuesten, 49 L. ed. 987, 198 U. S. 143, 25 S. Ct. 616 55
St. John vs. Thompson, 58 S. Ct. 38, 320 U. S. 718, 82 L. ed. 554 24
Sun Printing & Pub. Assn. vs. Edwards, 194 U. S. 377, 24 S. Ct. 696, 48 L. ed. 1027 53
Sutter vs. Sockey, 97 Okl. 107, 223 P. 161 28
Sutton vs. English, 246 U. S. 199, 38 S. Ct. 254, 62 L. ed. 664 52

Thompson vs. Ickes, 56 S. Ct. 133, 296 U. S. 612, 80 L. ed. 434 65
Thompson's Estate, 179 Okl. 240, 65 P. (2d) 442 ..... 24, 26
Timmons vs. Elyton Land Co., 139 U. S. 378, 35 L. ed. 195, 11 S. Ct. 585 55
Tioga Ry. Co. vs. B. & C. R. R. Co., 20 Wall. 137, 22 L. ed. 331 40

U. S. vs. Bank of N. Y., etc., 296 U. S. 463, 80 L. ed. 331, 56 S. Ct. 343 43
U. S. vs. Price, 9 How. 83, 13 L. ed. 56 35

Vidal vs. So. Amer. Securities Co. (C.C.A. N. Y. 1922), 276 F. 855 48

Wabash Ry. Co. vs. Adelbert College, 208 U. S. 38, 52 L. ed. 379..... 43
Waters-Pierce Oil Co. vs. Texas, 212 U. S. 86, 29 S. Ct. 220, 53 L. ed. 417..... 40
Wells vs. Helms, 105 F. (2d) 402.....24, 25, 47, 48
Wheeler vs. Bigheart, 172 Okl. 262, 43 P. (2d) 1028.. 31
Wilhelm vs. Consolidated Oil Corp., 84 F. (2d) 739..38, 64
Wilson vs. Beard, 26 F. (2d) 860 (see also appendix)..... 46
Wisner, In re, 203 U. S. 449, 27 S. Ct. 150, 51 L. ed. 264..... 64
Wolfe vs. Graham, 90 P. (2d) 1067, 185 Okl. 318.... 26
Wolfe vs. Hartford Life & Annuity Ins. Co., 148 U. S. 389, 37 L. ed. 493, 13 S. Ct. 602..... 55
Wright vs. Saltmarsh, 174 Okl. 226, 50 P. (2d) 694.. 32

Zahn vs. Obert, 60 Okl. 118, 159 P. 298..... 55

Statutes.

U.S.C.A., Tit. 28, Sec. 80.....49, 57
U.S.C.A., Tit. 28, Sec. 111..... 60
U.S.C.A., Tit. 28, Sec. 112..... 63
U.S.C.A., Tit. 28, Secs. 113-117..... 63
U.S.C.A., Tit. 28, Secs. 115-118.....37, 47
U.S.C.A., Tit. 28, Sec. 118..... 61
U.S.C.A., Tit. 28, Sec. 344..... 39
Okl. Const., Art. II, Sec. 30..... 50
U. S. Const., Art. III, Sec. 2..... 55
Okl. Const., Art. VII, Sec. 13..... 24
Okl. Const., Art. VII, Sec. 16..... 26
O. S. A., Tit. 12, Sec. 269..... 55
O. S. A., Tit. 12, Sec. 1108..... 49
O. S. A., Tit. 12, Sec. 1151.....50, 51
O. S. A., Tit. 12, Sec. 1152..... 51

O. S. A., Tit. 22, Sec. 171 50
O. S. A., Tit. 58, Sec. 122 31
O. S. A., Tit. 58, Sec. 123 32
O. S. A., Tit. 58, Sec. 724 27
Am. Jur., Vol. 14, Sec. 249, p. 445 43
5 Am. Law Rpr. 222 43

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 349.

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM AND JOE R. SOUTHARD, JR., PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, A CORPORATION, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, ET AL., RESPONDENTS.

OPINION BELOW AND JURISDICTION.

Petitioners E. A. Kelleam, Nell Southard, Joe E. Kelleam and Joe R. Southard, Jr., prosecute this proceeding to review a decision of the United States Circuit Court of Appeals for the Tenth Circuit (reported at 112 F. (2d) 940), affirming a decree of the United States District Court for the Northern District of Oklahoma, which they assert was entered without jurisdiction or venue under the constitution and laws of the United States and contrary to applicable provisions of the local law and which involves the state and federal courts in a

direct conflict, the one deciding the identical controversy one way, and the other another.

The decree of the United States District Court was entered June 21, 1939; the final opinion of the United States Circuit Court of Appeals for the Tenth Circuit, upon appeal timely prosecuted, July 17, 1940, and on July 25, 1940, conformable to the rules, said circuit court by order stayed its mandate pending certiorari, petition for which was filed Aug. 20, 1940, and granted Oct. 14, 1940.

Jurisdiction of the Supreme Court of the United States is invoked under Sec. 240 of the Judicial Code as amended by the Act of February 13, 1925 (Chap. 225, 43 Stat. 938, 28 U. S. C. A. 347) and under Para. 5 (b) of Rule 38.

STATEMENT OF THE CASE.

L. D. Kelleam died intestate, a resident of Creek County, Oklahoma, survived by the petitioners Dr. E. A. Kelleam and Nell Southard, his brother and sister, and by Fannie Bates and Mrs. Clyde Bates, paternal half-sisters (not parties to this proceeding), and by the respondents, other than the Maryland Casualty Company, who are children of five deceased paternal half-brothers and sisters. Upon joint petition of the brother and sister (R. 21-87) the brother was appointed administrator of the estate by the County Court of Creek County (R. 23-87). He qualified by executing a statutory administrator's bond with the respondent Maryland Casualty Company, a surety (R. 24-87), administered upon the estate, which consisted of real estate, cash, notes, stocks, personalty, etc. (R. 123), and presented his final account for approval. By an amended petition for determination of

heirship and distribution he alleged that the estate was a maternal ancestral estate and that he and his sister were sole heirs (R. 32-87); after notice by publication, as required by the statutes of the State of Oklahoma (R. 88), the County Court entered its decree adjudging the full brother and sister to be the heirs, ordering distribution of the estate to them, discharging the administrator and exonerating the bond (R. 35 to 41 and 87). No appeal was prosecuted from this decree by any adverse claimant and the decree became final under the applicable provisions of the Oklahoma statutes (58 O. S. A. 724).

The estate was distributed conformable to the decree to the full brother and sister, a report of such distribution made to the court, and an order of final discharge and releasing the administrator and bond from further liability duly entered on August 13, 1937 (R. 91).

By petition filed in the County Court on September 21, 1937, and amended petition filed November 16, 1937, the half-blood nephews and nieces who are respondents herein instituted in the County Court proceedings to vacate the decree of heirship and to recover an interest in the estate (R. 113 *ff.*, 92).

Therein they averred the entire proceedings theretofore had in the County Court were void for failure of notice and for fraud. Upon trial the County Court sustained a demurrer to the amended petition and ordered the proceedings to vacate the decree dismissed (R. 92). An appeal was prosecuted by the half-blood claimants to the District Court of Creek County (R. 93).

Some months after the proceedings to vacate the decree in the County Court were instituted, attorneys for the Maryland Casualty Company and attorneys for the

half-blood claimants conceived a plan to feign an issue in the federal court in an effort to circumvent the venue and jurisdiction of the County Court and appellate tribunals of the State of Oklahoma. Conformably, the surety filed the instant action in the U. S. District Court for the Northern District of Oklahoma, wherein it as plaintiff sued jointly the petitioners herein and the surety's co-respondents, asking that a receiver be appointed to take charge of the decedent's estate and that the property be impressed with an equitable lien to satisfy the claims of the half-blood kinsmen whom the surety averred were entitled to inherit and that its bond be exonerated (R. 5). E. A. Kelleam as administrator was never made a party defendant. The petitioners, J. R. Southard, Jr. and Joe E. Kelleam (sons of Nell Southard and E. A. Kelleam), were also designated as defendants for it was asserted that plaintiff believed the brother and sister had conveyed property to them, which conveyances plaintiff believed were without consideration and void. Fannie Bates and Mrs. Clyde Bates, the paternal half-sisters who had survived the decedent were designated as defendants in the complaint (R. 5) but not served with process nor did they otherwise become a party to the proceedings.*

Upon the date this suit was filed one of the half-blood contestants whose home was in Sallisaw (Sequoyah Co.), in the Eastern District of Oklahoma (28 U. S. C. A. 182) appeared in Tulsa, in the Northern District, and submitted to personal service there (R. 84).

---

* The Mrs. F. Bates who filed answer and cross-petition is a half-blood niece, daughter of Mary Perkins, bearing the same name as her aunt (R. 10-11).

Ten days thereafter the half-blood nephews and nieces by attorneys filed their separate answer and cross-petition wherein they joined in the prayer of the surety company for a receiver, admitted that the surety company was entitled to the relief in equity sought in its bill and the appointment of a receiver to take charge of the decedent's property and impound it, and asked that court to decree void the proceedings of the County Court and determine them heirs to the extent of 5/9ths of all the estate of the deceased (R. 10-21). This was the identical relief which they had previously sought and for which they were prosecuting their claims in the County Court. Asserted ground of jurisdiction in the federal court was diversity of citizenship. The nominal plaintiff, Maryland Casualty Company, is a resident and citizen of Maryland; its co-respondents herein, who were named as defendants were alleged to be "residents and citizens of the State of Arkansas and the State of Oklahoma." It was averred that part of them *lived* within the Northern District of Oklahoma (R. 5). The bill asserted that at the time it was filed E. A. Kelleam was a *resident* of Sells, Arizona; that Nell Southard and J. R. Southard, Jr., were *residents* of the State of Oklahoma (the federal district of residence was not alleged), and that Joe Kelleam a *resident* of the State of Arizona. The bill contained no allegation regarding the citizenship of the defendants who are petitioners here.

Five days after the action was instituted in the national courts, the half-blood nephews and nieces filed their answer and cross-petition and wholly without any service or attempt at service upon or notice to the petitioners, the respondents obtained an order appointing one J. M. Scott receiver of all property, real and personal, which

constituted assets distributed by order of the County Court. The order recites that all designated defendants except the petitioners herein joined in the application for the receiver. Four days later the receiver filed oath and bond and entered upon the discharge of his duties and the attorneys for the surety company were appointed by the court as attorneys for the receiver (R. 84-5).

Proof of service of process upon petitioners who reside in Oklahoma was not filed with the clerk until over sixty days following the filing of the suit, and E. A. Kelleam was not notified of the proceedings until sixty days after the receiver was appointed. Failure to give them notice and delay in service of process upon them is wholly unexplained by the record (R. 84-85). There was no service by publication upon unknown heirs and no constructive service was ever had or obtained (R. 86).

Appropriate pleas to venue and jurisdiction over the parties and the subject matter were presented to the trial court by the petitioners, overruled and exceptions saved (R. 86). Answers and pleas to the jurisdiction on behalf of the petitioners filed January 25, 1939, denied that any of the defendants lived within the Northern District of Oklahoma, denied the controversy was between residents and citizens of separate and different states and expressly denied that as between plaintiff and the defendant, E. A. Kelleam, the controversy involved any property located within the Northern District of Oklahoma. The prior proceedings of the County Court of Creek County, including the judgments therein, were set forth in detail and were alleged to constitute valid and binding judgments in the controversy and to make the matters involved *res adjudicata*. Charges of fraud in the proceedings in the County Court were also denied (R. 50-55)).

The cause came on for trial at Tulsa June 21, 1939. The petitioners herein, appearing specially, objected to the introduction of evidence upon the ground of want of jurisdiction and venue and the failure of the plaintiff's petition to state facts sufficient to constitute a cause of action. This plea was overruled with exceptions allowed (R. 87). The evidence of the casualty company itself revealed fully the prior proceedings had in the County Court of Creek County, as hereinabove set forth. It further established that by warranty deed, Nell Southard and R. J. Southard, her husband, had conveyed to *Maud Grady* an undivided one-half interest in two city lots in Drumright, Oklahoma, and that E. A. Kelleam had conveyed to *Ophelia E. Kelleam* a like undivided one-half interest in the same lots, which had constituted part of the decedent's estate. The introduction of these deeds was made over objection on the ground that Ophelia E. Kelleam and Maud Grady were not parties to the suit (R. 90). Evidence was further offered to show that property inventoried as assets of Legette D. Kelleam was not inventoried as assets of his deceased mother, Mary A. Kelleam (R. 90), and to show (over objection) that the full brother and sister had paid the two half-sisters (Fannie Bates and Mrs. Clyde Bates), or their successors in interest, $4,000.00 in settlement of their claims, if any, to share in the estate (R. 93-94).

A claim agent of the casualty company testified extensively to unsuccessful efforts following the decree of distribution in the County Court to have Dr. E. A. Kelleam turn over the property received by the distribution to the casualty company. This was before it obtained the order of court appointing the receiver. The company's agent testified that under the indemnity

agreement, Dr. Kelleam agreed to hire an attorney in event there was a claim filed under the bond; that the agent had had some discussion regarding the matter with Mr. Finch (an attorney for the half-blood claimants), that in event a claim was filed under the bond and Dr. Kelleam didn't hire an attorney, the Maryland Casualty Company would hire one and charge it back to him. "Naturally I told him under this agreement, he was to put the property where it would be impressed with a lien of the Maryland Casualty Company * * *" (R. 97).

Streeter Speakman, the attorney who had represented Dr. E. A. Kelleam and Nell Southard in the County Court was called as a witness for the casualty company and testified to efforts of Mr. Green, attorney for the company, to obtain control of the property distributed to the petitioners here by the County Court. Upon examination by the trial judge, this witness testified that according to his investigation the deceased got the money which he invested from his mother; that he, after a thorough investigation, had concluded the estate was a maternal ancestral estate; that the matter was fully presented to the County Court which entered a decree so holding. In regard to the money paid to the two surviving half-sisters, he denied that there was any agreement of secrecy about the matter, but on the contrary testified that all claimants were made parties in the notice by publication which was the process provided by the statute and assured that they were specifically named in the proceeding (R. 105-7).

J. M. Scott, the receiver, established the jurisdictional value of some of the property (R. 107).

Mrs. Ethel Riddler, one of the respondents, testified that she lived in Ft. Smith, Arkansas, and identified

part of the persons claiming to be heirs from a list prepared by one of the attorneys. She said the family had separated a good many years ago; that some of the heirs lived in California, but that she couldn't give the post office address of any single one. She said it had been ten years before Legette died since she had seen Dr. E. A. Kelleam and that she had not heard from Mrs. Nell Southard in maybe ten or fifteen years; that so far as she knew none of the nephews or nieces visited Mrs. Southard and Dr. Kelleam before Legette died. Upon cross examination she further testified:

"* * * my sister heard that the estate had been administered and told me. That was two years ago last October" (R. 108).

The date so fixed (October, 1936), was prior to the heirship decree and in ample time to have allowed an appearance in the County Court.

Francis Kelleam, one of the respondents, testified that her home was in Sallisaw but that she was working in Oklahoma City. After establishing her own relationship, she stated she had a brother in Amarillo; a brother in California and a sister in Oklahoma City (R. 110).

Jim Kelleam, a respondent, testified that she was a sister of Francis Kelleam, that she had been in Oklahoma City for 21 months; that Dr. Fannin Kelleam, one of her brothers, was in Amarillo. There was no more satisfactory evidence of the citizenship of the defendants than that indicated. She further testified that she had never seen Mrs. Southard and would not know R. J. Southard, Jr.; that the last time she had ever seen E. A. Kelleam was in 1926 and that they did nor correspond with each other.

Deeds were introduced establishing that Lots 7 and 8, Block 2, Bell Vern Addition to Oklahoma City and Lots 29 and 30, Block 7, College Hill Addition to Oklahoma City, being part of the decedent's estate, had been transferred to the decedent from the Tulsa Bldg. & Loan Association (R. 112).

At the conclusion of the testimony offered by respondents herein, petitioners demurred to the evidence and moved to dismiss for that:

1. The court was without venue and jurisdiction over the parties or the subject matter.
2. The issues had theretofore been fully adjudicated in the County Court, and
3. No cause of action was established in favor of the surety company.

Their attorney informed the court that petitioners here would stand upon these issues (R. 112-3).

The trial court after inquiry as to why the proceeding on appeal had not been disposed of in the District Court of Creek County, took the matter under advisement and thereafter on September 26, 1939, entered findings of fact, conclusions of law, and the decree herein complained of (R. 67-82).

While treating the action as local under Sections 116 to 118, U. S. C. A., the court's decree attempted to readjudicate all matters theretofore determined by the County Court, held the judgment of that court that the property was ancestral void, that cross-petitioners were heirs and owners of a 5/9ths interest in the decedent's estate, directed E. A. Kelleam and Nell Southard to account to the cross-petitioners for 5/9ths of the estate, the

value of which was not determined, and decreed cross-petitioners to have a lien upon the property in the hands of the receiver to satisfy the judgment. No evidence of any conveyance to petitioners Joe E. Kelleam or Joe R. Southard, Jr., was offered at the trial. The sole evidence of any conveyance of property received from the estate by respondents E. A. Kelleam and Nell Southard were the deeds of two city lots in Drumright, Oklahoma, to Maud Grady and Ophelia E. Kelleam, who were not parties to the record. Nevertheless the trial judge without any evidence of the circumstances attending such conveyances, decreed the attempted transfer of any part of the decedent's property by E. A. Kelleam and Nell Southard fraudulently made for the purpose of concealing their ownership therein, and in an attempt to prevent said property being reached by the cross-petitioning defendants and held that the grantees in such conveyances as a matter of law took said property "with notice of the defects therein." This finding was made without even proof of any transfer of any part of the estate to respondents Joe E. Kelleam or Joe R. Southard, Jr.

The decree further determined the Maryland Casualty Company liable to the extent of $12,000, but did not specify to whom, and decreed it entitled to exoneration by having the property in the hands of the receiver applied to satisfy the claims of the cross-petitioners.

The court's findings of fact (R. 68) and decree (R. 81) fail to include a finding as to the citizenship, residence or address of Kelleam Hall, which was jurisdictional. The places of residence of many of the remaining defendants set forth in the findings of fact do

not correspond with any testimony in the case (R. 108-111) nor with the complaint (R. 5). The facts regarding diverse citizenship and jurisdiction were directly put in issue by the answer (R. 51-2).

Upon appeal duly prosecuted the Circuit Court of Appeals for the Tenth Circuit affirmed this decree and the action was brought to this court by certiorari in due form.

SPECIFICATIONS OF ERROR.

Jurisdictional errors in the proceedings complained of are as follows:

I. After final judgment had been entered by a County Court of the State of Oklahoma in the exercise of its probate jurisdiction to administer upon the estates of deceased persons, which judgment decreed heirship, ordered and approved distribution, discharged its administrator and exonerated his statutory administrator's bond, it was error to permit the non-resident surety upon such administrator's bond to enter suit in the United States District Court ostensibly for another "exoneration" upon the bond against the principal, who was also a non-resident, and upon non-resident service under Section 118, 28 U. S. C. A., to decree void the judgment of the County Court exonerating the bond, and to enter judgment imposing liability upon the surety and the administrator, for

a. The court had no jurisdiction of the parties to the bond.

b. The court had no jurisdiction of the asserted cause of action because of the prior judgment and proceedings of the state courts.

c. The court had no venue over the parties.

d. The action was not local under 28 U. S. C. A., Sections 116-118.

e. The bill stated no cause of action within either the legal or equitable jurisdiction of the court.

II. After a County Court of the State of Oklahoma in the exercise of its jurisdiction to review its own decrees has rendered judgment in a proceeding to vacate that court's final decree from which an appeal has been taken conformable to the state law to the District Court of the state, it was error to permit a non-resident surety upon the administrator's bond who was a party to the proceeding in the County Court to institute an original action in equity in the United States District Court and for that court to assume jurisdiction to supersede the County Court and the appellate tribunals of the state, and upon service as in a local action under the provisions of Sections 116-118, 28 U. S. C. A., to appoint a receiver of the decedent's estate and upon cross-petition of contending claimants reinvestigate on questions of law and fact the correctness of the County Court's decree of heirship and distribution and its order discharging the bond, determine heirs, direct an accounting by the persons adjudged lawful distributees by the County Court, surcharge the administrator upon his bond, impress a lien in favor of the losing claimants in the County Court upon the decedent's estate (part of which is realty located in the district), and order the same foreclosed, upon the theory that the action was a *local* action, where there was no diversity of citizenship between the contending claimants nor proof of the citizenship of part of them, and no party to the proceeding, either plaintiff or defendant was shown to be a resident of the district in which the suit was instituted and

questions of jurisdiction and venue were properly raised in the pleadings and preserved in the record, for in addition to the foregoing causes:

a. The burden was upon the persons asserting jurisdiction in the federal court for diversity of citizenship to establish diversity, which was not done.

b. There was no complete diversity of citizenship between the real parties in interest, hence no jurisdiction.

c. The relief prayed and granted was *in personam* against non-residents of the Northern District and was beyond the jurisdiction of the court.

1. The petitioners were neither inhabitants of nor found within the Northern District in which the suit was brought and who did not voluntarily appear and as to them the decree is void.

2. Because jurisdiction was predicated upon diversity of citizenship and neither plaintiff nor any defendant was a resident of the district, and objection was made by the petitioners.

SUMMARY OF THE ARGUMENT.

For reversal, petitioners here submit the following as controlling propositions of the law:

I. The jurisdiction of the County Courts of Oklahoma in probate matters is exclusive original jurisdiction.

II. That jurisdiction was duly invoked and exercised prior to the institution of the instant proceeding, both as to the subject matter and the parties.

III. The judgment of the County Court refusing to vacate its decree of heirship was in conformity to local law.

IV. Whether the judgment of the County Court was right or wrong, it was the duty of the federal court to sustain the plea of the petitioners to dismiss the bill of the surety for want of jurisdiction at the trial for:

a. The action, if any was *ex contractu* and transitory, and the court had no jurisdiction of the parties to the bond. Non-resident service upon the defendant E. A. Kelleam without the state was unauthorized.

b. The federal court had no jurisdiction of the asserted cause of action because of the prior judgment and decree of the state court. Were an action has been tried and judgment rendered in a state court of competent jurisdiction, and is pending on appeal in the state court, federal courts are without original jurisdiction to review the judgment. Appellate jurisdiction in cases of this character is vested exclusively in the Supreme Court of the United States after appeal to and decision by the highest court of the state to which an appeal may be had and even then under the limitations as to subject matter prescribed by federal law.

c. The U. S. District Court for the Northern District had no venue of the parties. They were not found within the district; did not reside within the district, and did not submit to service there.

d. The suit was not a local action under the provisions of 28 U. S. C. A., Secs. 116-118.

e. The bill stated no cause of action within either the legal or equitable jurisdiction of the court. The allegations of the bill and the evidence at the trial failed to show a cause of action maintainable under provisions of the local law.

V. It was the duty of the court to sustain the motion of the petitioners to dismiss both the bill and the

cross-petition at the trial for want of jurisdiction for:

a. The burden was upon those asserting jurisdiction in the federal court for the diversity of citizenship to establish diversity, which was not done. Neither the residence nor citizenship of Kelleam Hall was determined in the court's findings of fact or established by the evidence. The evidence is insufficient to show diversity of citizenship for vague and contradictory allegations with reference to residence and conflicting findings upon the facts as to residence are insufficient to establish citizenship for jurisdictional purposes.

b. There was no complete diversity of citizenship between the real parties in interest as required by 28 U. S. C. A., Secs. 111-112. The court should have realigned the parties in accordance with their true interests to test its jurisdiction and when this is done there is no complete diversity of citizenship.

c. The relief prayed and granted was *in personam* against non-residents of the Northern District and was beyond the jurisdiction of the court.

1. The petitioners were neither inhabitants of nor found within the Northern District in which the suit was brought and did not voluntarily appear. Since they were indispensable parties the decree is void.

2. Examination of the bill shows jurisdiction predicated not upon a local action or upon some provisions of the federal law but upon diversity of citizenship. Neither plaintiff nor any defendant was a resident of the district in which the suit was brought and timely objection was made by the petitioners. Under the circumstances, it was the court's duty to dismiss for want of jurisdiction under Title 28, U. S. C. A., Sec. 112.

ARGUMENT AND AUTHORITIES.

Any cause of action in favor of the Maryland Casualty Company must find its origin in the administrator's bond, filed in the County Court. The condition of the bond was:

> "* * * if the above bounden principal shall faithfully execute the duties of such trust as administrator according to law, then this obligation to be void, otherwise to remain in full force and effect."

Parties to this bond were E. A. Kelleam and the surety, and its liability was limited to the acts of the principal as administrator. This was a contractual liability purely, from which the final order of the County Court constituted a full and complete release.

The surety's suit presented for determination of the United States District Court purely an abstraction—whether it was entitled to what it calls "exoneration" after it had been discharged from liability. Under the pretext of presenting for adjudication this abstraction, contingent clearly upon acts beyond the control either of itself or of the court, such as the diligence and success of litigants in prosecuting an appeal and subsequent enforcement of appropriate remedies, by collusion with claimants whose interests were hostile to that of its principal, it obtained *ex parte* and without notice a receivership. It summarily divested heirs to whom property had been awarded in the usual course by the County Court, and their grantees who were not parties to the record, of property, real, personal, and mixed and wherever located.

Analysis of the opinion of the Circuit Court of Appeals indicates that jurisdiction in the United States District Court was sustained solely under Sectons 116 and 118, 28 U. S. C. A., which sections provide that a local action involving property of a fixed character lying partly in one district and partly in another may be brought in the District Court of either district and that service of summons on absent defendants may be had in suits to enforce liens. The court held Sections 111-112, 28 U. S. C. A., upon which appellants relied, inapplicable.

The nature of the suit in the opinion of the Circuit Court is variously stated:

A. *"This is an action to impress a trust on real and personal property with a fixed situs in the Northern and Western Districts of Oklahoma"* (R. 141). (Italics added.)

B. "The estate has been closed, the property * * * distributed * * *, and *this is a proceeding not against the administrator but against those who procured the property.* The proceeding is against them *in their individual capacities,* and is an attempt *to deprive them of what it is alleged they procured through a void judgment* * * *" (R. 142). (Italics added.)

C. "That a surety may maintain an action against its principal to obtain indemnity * * * is unquestioned. * * * In such an action a receiver may be appointed pending the determination of the issues in the action for exoneration. * * * But, say appellants, here the surety company has been twice exonerated. * * * *The whole controversy therefore centers around the question whether the judgment of the Probate Court was procured by fraud and is void"* (R. 142). (Italics added.)

The Circuit Court conceded and the trial court found no complete diversity of citizenship between the contending claimants (R. 68-9). Insofar as the action was one to impress a trust upon real and personal property, there was no complete diversity of citizenship between those seeking this relief. The surety joined by the half-blood claimants, some of whom were residents of Oklahoma, were opposed by the administrator and distributees under the order of the County Court, some of whom were also residents of Oklahoma. Insofar as the proceeding was not against the administrator but against those who procured the property to deprive them of what they procured through a void judgment, there was no complete diversity of citizenship because resident claimants were aligned on opposite sides. With respect to the action of the surety to maintain indemnity against its principal and the appointment of a receiver pending determination of the issues, the Circuit Court concedes that *the whole controversy centers around the validity of the judgment of the probate court.* This necessarily follows, for if the judgment is valid, the surety is not entitled to indemnity or to a receiver. Obviously, in any proceeding to void the judgment, all whose rights are affected by it must be made parties and when these are aligned in accordance with their true interests, the administrator and the surety and the distributees under the decrees of the County Court and their grantees must be arrayed against the half-blood claimants. When this is done, there is again no diversity of citizenship between the real parties in interest, and indispensable parties are absent or beyond the jurisdiction.

Or if the action be viewed as one between the surety and its principal upon the bond, clearly the suit is merely one on a contract, and maintainable only in the state and district in which defendant, E. A. Kelleam, resides.

The decree and judgments of the court below erroneously sustain jurisdiction in the federal courts to hold an administrator not sued as such liable for executing the orders of the court of which he was an officer. After the County Court's jurisdiction to review its own decree had been properly invoked and after judgment was rendered by it sustaining the questioned decree, which judgmnt under the state law was final, subject only to be vacated or set aside on appeal, the United States District Court was without jurisdiction to intervene by appointment of receiver and take charge of the entire litigation at the instance of a surety who was the beneficiary of the County Court's judgment. The jurisdiction of the County Court was exclusive original jurisdiction in probate matters. An appeal, which was an adequate remedy at law was available, and intervention of the federal district court by an original action in equity while the appeal was pending in the state court was unauthorized. Federal jurisdiction on appeal was not vested in the U. S. District Court but in Supreme Court of the United States after appeal to the highest appellate tribunal of the state and under the restrictions of the Constitution and Laws of the United States.

The opinion suggests the property had a fixed situs in the Northern District. But the decree was limited to no particular property but fixed a lien upon it all, real, personal and mixed, with no proof of its situs.

The opinion asserts that the County Court judgment was procured by fraud and was therefore void, but the acts charged as fraud (failure to give notice of the application for appointment as administrator and personal notice of the proposed distribution) are mere procedural acts like failure to issue some form of process. These

acts are not required by the statutes of the state, and such omissions have been held not fraudulent nor necessary both by the prior decree of the County Court and by decisions of the Supreme Court of the State of Oklahoma in like cases. The record shows the parties complaining not prejudiced by such omissions, for their testimony in the record indicates they did have actual notice.

To bolster charges of fraud it is asserted that a settlement was made with the surviving half-sisters and their successors in interest. But this in no manner prejudiced the rights of the cross-petitioners. Obviously a settlement which in no manner affected the rights of any party to this suit could not constitute fraud. Such a settlement was not even competent evidence on the issue of fraud.

To reinforce findings of fraud, the opinion refers to conveyances after the decree of heirship of the County Court as acts of a "faithless trustee." Such conveyances were not by the administrator at all, but by distributees whose ownership of the property had been at the date of trial twice upheld by the County Court and in strict conformity with their rights under the judgment. Why lawful acts performed in the usual course should be condemned with such severity is hard to understand.

Respondents' contentions applied invalidate the judgment of the federal court complained of.

If it be the law that no judgment can be valid without personal as well as constructive notice, and that any judgment entered without personal notice is so wholly void that it may be brushed aside by any court in any proceeding, consideration must be given to the effect of

the application of such rule in the case at bar. It is undisputed that the judgment appointing a receiver herein was entered by agreement between the respondents and without either actual or constructive notice to any of the petitioners. The decree attempts to determine the liability of Dr. E. A. Kelleam as administrator upon his official bond without ever serving process upon him or making him party in his capacity as administrator or his appearance as such. Under the terms of the bond the surety was only chargeable for his official acts.

The decree in the case at bar also attempts to vacate conveyances to *Maud Grady and Ophelia E. Kelleam*, who are not parties to the record, without notice to them of any kind. A new decree of heirship was attempted without notice to the surviving half-sisters or constructive service on unknown claimants. If the original judgment of the County Court is void for failure to give personal notice that herein complained of is void for failure to give any notice under similar circumstances.

The surety company attempted, it admits, to compel Dr. Kelleam, whom the County Court had twice determined lawfully entitled to that portion of the estate distributed to him, to turn over that estate to some of its representatives. To punish him for treating the orders of the County Court as binding it secretly obtained the appointment of a receiver by agreement with his adversaries. It delayed issuing process for an extended period, using the receivership, in a futile attempt to coerce him into an appearance in the federal court.

The decree complained of involves the state and federal courts in direct conflict. The administrator, E. A. Kelleam, was an officer of the court by which he was appointed, and distributed the property as directed by

that court. In a direct attack upon its decree, the County Court sustained its prior adjudication and again exonerated its officer. The U. S. District Court attempts to circumvent the orders of the County Court by summarily appointing a receiver to supersede and countermand execution of its orders, penalizing the administrator for discharging his duties conformable to the orders of the court by which he was appointed by surcharging him upon his bond and taking from him and another distributee an inheritance that had been awarded them as heirs.

Clearly the case represents a wide departure from the usual course of judicial procedure. If a surety upon a judicial bond twice exonerated by the court in which the bond was executed may by instituting suit for a third "exoneration" in the national courts thereby invest the federal district courts with authority to review cases pending on appeal in the state courts, vacate judgments, administer estates, decree heirship, and surcharge the bond, and enforce such decrees by receiverships, the functions of state tribunals where the interests of a nonresident surety are involved are at an end. For if the right to such an "exoneration" existed even after two judgments it obtained with even greater virility before either, and the surety, having contracted for hire to assume liability for the misconduct of the court's officer may supersede the court and the officer and take over the functions of both which cannot have been the intent of the law.

I. Jurisdiction of the County Courts of Oklahoma in probate matters is exclusive original jurisdiction.

> "The County Court shall have the general jurisdiction of a Probate Court. It shall * * * grant letters testamentary and of administration, settle accounts of * * * administrators, * * * transact all business appertaining to the estates of deceased persons, * * * and distribution thereof. * * *." Const. Okla., Art. VII, Sec. 13.

Incident to probate jurisdiction, such County Courts may upon final settlement and distribution determine the heirs to whom the estate shall go. *In re Thompson's Estate,* 179 Okl. 240, 65 P. (2d) 442. Certiorari denied, *St. John* v. *Thompson,* 58 S. Ct. 38, 320 U. S. 718, 82 L. ed. 554; *Wells* v. *Helms* (C.C.A. 10th Cir., Okl.), 105 F. (2d) 402.

> "The probate jurisdiction of the county courts extends to the sale, settlement, partition and distribution of the estates of deceased persons (Section 13, Art. 7, Constitution); and it has long been recognized that as an incident to that jurisdiction the county court may, upon final settlement and distribution, determine the heirs to whom the estate shall go, as provided in sections 1358-1361, O. S. 1931. That power extends at least to all assets subject to payment of the debts of the deceased. *Teague* v. *Smith,* 85 Okl. 12, 204 P. 439; *Hilton* v. *Coyne,* 103 Okl. 279, 229 P. 630; *Hogan* v. *Superior Court,* 122 Okl. 295, 254 P. 966; *Hutson* v. *McConnell,* 139 Okl. 240, 281 P. 760; *Hardridge* v. *Hardridge,* 168 Okl. 7, 31 P. (2d) 597." *In re Thompson's Estate, supra.*

> "An administrator appointed by a state court is an officer of that court and takes possession of the decedent's property in obedience to the orders of the court. His possession is the court's possession and

cannot be disturbed by any other court. *Byers* v. *McAuley,* 149 U. S. 608, 615, 13 S. Ct. 906, 37 L. ed. 867." *Wells* v. *Helms, supra.*

"Sec. 13, Art. 7, Okla. Constitution, Okl. St. Ann. (O. S. 1931, Sec. 1067, 58 Okl. St. Ann., Sec. 1) confers general probate jurisdiction upon the county courts of Oklahoma. Incidental to that general jurisdiction it has power to determine heirship pursuant to the provisions of Secs. 1358 to 1361, O. S. 1931, or Secs. 1386 to 1396, O. S. 1931, 58 Okl. St. Ann., Secs. 631-634, 84 Okl. St. Ann., Secs. 251-261. *In re Thompson's Estate,* 179 Okl. 240, 65 P. (2d) 442, 445." *Wells* v. *Helms, supra.*

Where administration proceedings are pending in the County Court, or may be instituted therein, District Courts have no jurisdiction or power to undertake to administer upon such an estate by a receivership.

"In the case of *Dillard* v. *Franklin,* 177 Okl. 34, 57 P. (2d) 629, an administration proceeding was pending wherein a will was being probated, and certain minor heirs were represented by a guardian, and the district court undertook to appoint receivers for the administration of the estate, it being alleged that mismanagement and misconduct were bringing about the destruction of the estate. We said: 'Under Section 13, Article 7, of the Constitution of Oklahoma, the county courts of this state have the general jurisdiction of a probate court. They shall probate wills, * * * grant letters testamentary and of administration, settle accounts of executors and guardians, and transact all business appertaining to estates, including the sale, settlement, partition, and distribution of the estates; and, while administration proceedings are still pending, the district courts of this state have no jurisdiction to appoint receivers to take charge of said estates."

"We will not cite additional authorities, for we think there can be no better settled rule of law." *Bryan* v. *Seiffert,* 185 Okl. 496, 94 P. (2d) 526.

Prohibition lies to prevent such an unauthorized act of a district court. *State ex rel. Morrell* v. *Worten,* 161 Okl. 130, 17 P. (2d) 424.

The jurisdiction of the District Court in probate matters is appellate only.

The original jurisdiction in such matters is exclusively in the County Court. The jurisdiction of the District Court in such matters is appellate only. Section 16, Art. 7, Constitution. *In re Gentry's Estate,* 158 Okl. 196, 13 P. (2d) 156; *In re Douglas' Estate,* 185 Okl. 25, 90 P. (2d) 35; *In re Barrett's Estate,* 181 Okl. 262, 72 P. (2d) 482.

The decree of the County Court determining heirship, rendered as incident to final settlement, unless appealed from, is conclusive. *In re Thompson's Estate,* 179 Okl. 240, 65 P. (2d) 442.

"Probate proceedings in the settlement of estates are in the nature of proceedings *in rem,* and, when statutory notice has been given, all the world is charged with notice. And a decree of distribution and settlement of heirship rendered on such notice, in the absence of a showing of fraud or collusion, is binding on all parties claiming an interest in the estate, even though not mentioned in the proceedings nor personally served with notice." *Wolfe* v. *Graham,* 90 P. (2d) 1067, 185 Okl. 318.

The appeal must be taken by a person interested, who was present, within ten days, and by a person interested, who was not a party, and not present, within thirty days.

"An appeal by a party, or by a person interested who was present at the hearing, must be taken within ten days, and an appeal by a person interested, who was not a party and not present at the hearing, within thirty days from the date of the judgment, decree or order appealed from." 58 O. S. A. 724.

"Defendant sought by her motion in county court to have entered *nunc pro tunc* an alleged order approving the loan which order, she says, was made at the time the loan was consummated. The ruling of the county court was to the effect that no such order of approval had ever been made, and refused to enter one as requested. Eighty days, or more, went by before an appeal was attempted from this order. If the order was one affecting a substantial right, Section 1397, O. S. 1931, 58 Okl. St. Ann., Sec. 721, it was appealable, and, if appealable, the notice was filed too late and the district court acquired no jurisdiction of the *nunc pro tunc* matter. The statute is mandatory, Sections 1400, 1041, O. S. 1931, 58 Okl. St. Ann., Secs. 724, 725; *Sutter* v. *Sockey,* 97 Okl. 107, 223 P. 161." *Hines* v. *Armstrong,* 77 P. (2d) 671, 182 Okl. 344.

District Courts have no jurisdiction until and unless an appeal is prosecuted in compliance with this section.

"Before the district court can hear and determine a cause appealed from the county court in a probate proceeding, its appellate jurisdiction must be invoked by a strict compliance with the requirements of the statute regulating such appeals." *Adair* v. *Montgomery,* 74 Okl. 21, 176 P. 911.

Provisions as to time must be observed.

"The time in which to take appeal from orders of the county in probate matters, to the district court, is fixed by Section 1413, Comp. Stat. 1921, and must

be complied with by taking the appeal within the time therein provided. If the appealing party is a party to the proceeding, or, if not a party to the proceeding and having an interest therein and present at the proceeding, the appeal must be taken within ten days. Others interested in the proceeding must appeal within 30 days." *Sutter* v. *Sockey*, 97 Okl. 107, 223 P. 161; *Hines* v. *Armstrong*, 182 Okl. 344, 77 P. (2d) 671, *supra*.

II. That jurisdiction was duly invoked and exercised prior to the institution of the instant proceeding as to both the subject matter and the parties.

The surety, the administrator, and the contending heirs were all parties to the proceedings in the County Court.

> "Q. Mr. Green did appear in the County Court?" "A. That is right, he was representing the Maryland Casualty Company" (R. 97).

The statutes of the State of Oklahoma require no personal notice to persons claiming a right to inherit. Jurisdiction to distribute property, real and personal, depends upon notice by publication, which in effect is a summons to the world.

> "Mrs. McJunkin, his sole issue, was not mentioned in the will. She was left to inherit that portion of Mrs. Gassin's estate which her father would have taken had he been alive. * * * But she made no claim for it. Decree of distribution, upon proper notice, was passed confirming the land to plaintiffs under the will. By direction of statute this decree was 'conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside, or modified on appeal.' * * * However reprehensible it may have been for Mrs. McJunkin's aunts and uncles, who knew of her existence and could have

learned her whereabouts, to have refrained from seeing to it that her interest in the estate was preserved, there was no fraud which prevented an appearance in her behalf. The notice prescribed by statute being given, there was no further duty owed her by them. *Monk* v. *Morgan*, 49 Cal. App. 154, 192 P. 1042. The statute required no personal notice. It is constitutional. *Goodrich* v. *Ferris*, 214 U. S. 71, 29 S. Ct. 580, 53 L. Ed. 914. When the required notice is given, hearing had and decree entered, though erroneous, the latter is invulnerable to collateral attack, except as it may be vacated pursuant to statute or set aside for extraneous fraud. It concludes unknown heirs. * * * Jurisdiction to distribute the lands depended upon notice of hearing to that end, which was given. This notice, in effect, summoned the world." *Gassin* v. *McJunkin*, 48 P. (2d) 320, 173 Okl. 210.

The decree of distribution is binding on both the administrator and his sureties and is not subject to collateral attack. *Hartford Accident & Indemnity Co.* v. *Goldberg*, 61 P. (2d) 704, 178 Okl. 75.

"In *Boudinot, et al.* v. *Locust, et al.*, 55 Okl. 662, 151 P. 579, 155 P. 698, this court held: 'The sureties upon an administrator's bond are, in the absence of fraud, concluded by the decree of the county court, duly rendered upon a final settlement and accounting by their principal, as to the amount of the principal's liability, although the sureties on the bond are not parties to the accounting.'

"And said: 'The judgment, being final, is conclusive in this action, not only as to the administrator, as principal, but also as to the sureties on his bond. The current of authorities is almost unbroken that final settlements of the administration, when made by an executor or administrator in pursuance

of statutory requirements, are conclusive as to all matters therein directly adjudicated.'

"Therein this court quoted from Judge Woerner in his work on the American Law of Administration, Sec. 255, stating the general rule as follows: 'The liability of a surety on an administrator's bond is coextensive with the liability of the principal in the bond. The refusal or neglect of the principal to obey or comply with the judgment or decree of a court of competent jurisdiction constitutes a breach, rendering the sureties liable, and they are bound and concluded by such judgment against the principal, unless, of course, there was collusion or fraud between the principal and those who seek satisfaction out of the sureties, which must be established in a direct proceeding.'

"The defendants' answer was a collateral attack on a judgment of a county court. That judgment may not be attacked collaterally. *Johnson* v. *Petty*, 118 Okl. 178, 246 P. 848." *Exendine* v. *Iron*, 4 P. (2d) 1035, 153 Okl. 177.

County Court judgments are entitled to the same presumptions of validity that attend those of other courts.

"County courts in this state have general jurisdiction in probate matters and their orders and judgments will be accorded the same force, effect, and legal presumption as other courts of general jurisdiction.

"The fraud which will justify the cancellation in an equitable suit of a judgment or order of the probate court must be extraneous to the issues, and such as prevented the complaining party from having a fair hearing.

"False evidence or perjury alone, relative to an issue tried, is not sufficient grounds for vacating or

setting aside a judgment; the fraud which will authorize the court to vacate a judgment must be extrinsic or collateral to the issues tried in the cause wherein the judgment was rendered; it must be such fraud as to prevent the other from having a trial of the issues.'' *Calkin* v. *Wolcott, et al.*, 77 P. (2d) 96, 182 Okl. 278.

The County Court also had the jurisdiction to review its own decree for fraud or irregularities which it exercised.

> ''In the case of *Caulk* v. *Lowe*, 74 Okl. 191, 178 P. 101, 106, this court held:
>
> > 'It cannot be questioned that under Sections 5267 to 5275, Revised Laws, inclusive, the county court had jurisdiction to set aside its orders and judgment for fraud practiced by the successful party in obtaining such orders or judgment.' '' *Wheeler* v. *Bigheart*, 172 Okl. 262, 43 P. (2d) 1028.

The parties conceded this jurisdiction and first sued in the County Court.

III. The judgment of the County Court refusing to vacate the decree was in conformity to local law.

The full-blood brother was entitled to letters of administration upon application forthwith and without notice. 58 O. S. A. 122, so far as material reads:

> ''Administration of the estate of a person dying intestate must be granted to some one or more of the persons herinafter mentioned, and they are respectively entitled thereto in the following order:
>
> 1. The surviving husband or wife, or some competent person whom he or she may request to have appointed.

2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate."

And 58 O. S. A. 123 provides:

> "Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole blood to those of the half blood."

Sims v. *Billings,* 162 Okl. 51, 18 P. (2d) 1084; *Appeal of Sims' Estate,* 162 Okl. 35, 18 P. (2d) 1077, holding that:

> "A party under the statute having the prior right of appointment of administrator is entitled to the appointment without notice to anyone."

That the administrator failed to give personal notice to adverse claimants or to allege in his pleadings that claimants he contended were not heirs were heirs in fact was not fraud. *Wright* v. *Saltmarsh,* 174 Okl. 226, 50 P. (2d) 694; *Gassin* v. *McJunkin,* 48 P. (2d) 320, 173 Okl. 210. The following is quoted from the former case:

> "Now, are the acts of fraud alleged of such character that would warrant the court in setting aside a judgment? It is a settled rule in this jurisdicion as well as most other states that fraud which vitiates judgment and which will authorize a court of equity to vacate it is fraud extraneous of the record by which the court was imposed upon in the proceeding, or by which the party complaining was prevented

from having his interest fairly presented or fully considered by the court. *City of Guthrie* v. *McKennon,* 19 Okl. 306, 91 P. 851; *Brown* v. *Trent,* 36 Okl. 239, 128 P. 895; *Ely Walker Dry Goods* v. *Smith,* 69 Okl. 261, 160 P. 898.

"Does the fact that the defendant failed to disclose to the county court certain knowledge which she possessed which, if disclosed, might have defeated her recovery come within the above rule? It was held in *Burke, et al* v. *Bladine, et al.,* 99 Wash. 383, 169 P. 811, 814, that: 'It is not fraud for a party to an action to fail to disclose to his adversary evidence that will defeat his own claim and sustain that of the adversary.'

"And in the case of *Davis* v. *Seavey,* 95 Wash. 57, 163 P. 35, 36, Ann. Cas. 1918D, 314, that 'The only allegation of the complaint which in any way suggests fraud on the part of respondent is that she as executrix came into possession of the property and papers of the deceased, including the alleged codicil, and that she did not make known to the court the existence of the codicil in the course of the administration of the estate. This in no event could amount to anything more than an allegation that respondent did not present to the court upon the final distribution hearing the true facts touching the question of who is entitled to the property as distributee. In other words, this is nothing more than an effort to avoid the decree of distribution as a final adjudication because of the presenting of false proof touching the merits of the question of who is entitled to the property of the estate as distributee.'

"Now the text-writers, in dealing with this subject in 34 C. J. 475, announce the rule as follows: 'No party is bound to furnish weapons to his adversary or plead himself out of court; and the mere fact that he keeps silent and does not communicate

to the court or to the adverse party the facts which would defeat his recovery is not such fraud as will justify a court in equity in enjoining a resulting judgment.' "

It would be a strange rule that branded fraudulent allegations of facts in pleadings honestly believed to be true and which were thereafter sustained by the court upon thorough investigation of the facts as the record shows to be the case here. Any error made was an error of the court in applying the law to the facts but not fraud.

Laches and limitations were of course available as defenses in the County Court. The evidence before that court is not in the record, but the law presumes evidence presented at the trial supported and judgment entered. *Manuel* v. *Kidd,* 258 P. 732, 126 Okla. 71. Moreover, it is established that at the trial in the federal court Ethel Riddler, one of the half-blood claimants, testified:

"My sister heard that the estate had been administered and told me. That was two years ago last October."

The date so fixed was prior to the decree of heirship and this evidence stands undisputed. It follows therefore that the judgment of the County Court sustaining its decree conforms strictly to the laws of the state.

The construction of administration laws of the state by the Supreme Court of the state is binding on the federal courts. Such laws are not merely rules of practice, but laws limiting the rights of the parties. *Security Trust Co.* v. *Black River Nat. Bank,* 187 U. S. 211, 23 Sup. Ct. Rep. 52, 47 L. ed. 147.

IV. It was the duty of the federal court to sustain the plea of the petitioners to dismiss the bill of the surety for want of jurisdiction at the trial:

(a) Because the action, if any existed, was *ex contractu* and the court had no jurisdiction of the parties to the bond.

Whatever the issue remaining after the proceedings in the County Court, it stemmed from and was grounded upon the bond. The obligations of a surety arise only from positive contract and are legal and not equitable. Equity will not hold a surety liable where he has been discharged at law.

> "That equity will not hold a surety liable, where he is discharged at law, seems to be well settled both in England and in this country, as a reference to a few of the decisions on this subject will fully show. In *Wright* v. *Russel*, 3 Wilson 530, it is said, 'that courts of equity are favorable to sureties, and where they are not strictly bound at law, equity will not bind them.' And in *Simpson* v. *Field*, 2 Ch. Cas. 22, it was held 'that, where a surety is not bound at law, he will not be made liable in equity.' In the case of *Waters* v. *Riley*, 2 Harris & Gill 310, the Court of Appeals of Maryland say: 'A surety is bound only by the bond itself, and is not under a moral obligation to pay; equity will not therefore interfere to charge him beyond his legal liability.' The same doctrine is established by the Court of Appeals of Virginia, in *Harrison* v. *Field's Ex.*, 2 Washington 136, and by the Supreme Court of Pennsylvania in *Weaver* v. *Shryock*, 6 S. & R. 206, and *Kennedy* v. *Carpenter*, 2 Wharton 361." *U. S.* v. *Price*, 9 How. 83, 13 L. Ed. 56.

Sureties are not liable beyond the terms of their contract.

Presumptions or equities are never allowed to enlarge or in any degree to change their legal obligations. *Leggett* v. *Humphreys,* 21 How. 66, 16 L. ed. 50; *Southwestern Surety Ins. Co.* v. *U. S. Fidelity & Guaranty Co.,* 182 P. 522, 75 Okl. 232; *Logan* v. *Hopkins,* 205 P. 1095, 85 Okl. 278.

A compensated corporate surety has no equitable interest in the funds derived from the contract covered by the bonds. *N. O. Nelson Mfg. Co.* v. *McDougal,* 43 P. (2d) 399, 171 Okla. 477; *Metropolitan Casualty Ins. Co. of N. Y.* v. *United Brick & Tile Co.,* 167 Okl. 402, 29 P. (2d) 771. In the latter case, which involved a claim by the insurance company upon an insolvent construction company's bond that it had such an equity in the moneys received from the execution of the contract, that it was in equity entitled to have them applied to the satisfaction of the indemnified obligations rather than to the prior debts of the principal, the Supreme Court of Oklahoma decided the surety obtained no such equity in the property of its principal. The following is quoted from the opinion, which is itself an exhaustive brief upon the question:

> "In view of the above authorities and the public policy as announced by Section 10613, O. S. 1931, and Section 10983, O. S. 1931, we are constrained to hold that the contract price is subjected to no equity in favor of the surety as against materialmen furnishing material for the construction of said project unless such equity arises in a proper manner by contract between the surety and said contractor, of which contract the materialmen are required by other provisions of law to take notice. The purpose of requiring the execution of said bond was to relieve materialmen of anxiety concerning payment of the indebtedness for furnishing material used in the construction

of public works. The bond is an unconditional guaranty of payment and the compensated surety places itself in the position of peril voluntarily and assumes the risk incident to the default of the contractor in paying his obligations. To hold otherwise would strike down the manifest purpose of said bond and would enable contractors in public works to thwart the just claims of materialmen who are creditors."

It is apparent that the issue tendered was liability at most upon a contract, for if its obligation involved no equitable liabilities, it was not entitled to exoneration from contingent equitable demands for they were non-existent.

The only service had or attempted upon E. A. Kelleam was non-resident service under the provisions of 28 U. S. C. A., Sections 115, 116 and 118. The provisions of these sections, which are so familiar that they do not require quotation, apply only to local and not transitory causes of action, *Kansas Gas, etc.*, v. *Wichita Natural Gas Co.* (C.C.A. Kan.), 266 F. 614, and where a specific *res* is involved. *Creager* v. *P. F. Collier & Son Co.*, 36 F. (2d) 781.

"We think there is no basis for the contention that the section contemplates the exercise of jurisdiction by a federal court upon the assumption of its control over property where there is no property subject to control within the jurisdiction. In other words the power conferred rests upon a real, not an imaginary, base. This being true, we are of opinion that a federal court has not jurisdiction over a person not within its territorial jurisdiction, or over property in the custody of such person, not within such territorial jurisdiction, merely because a state court may, as to such person and such property, because of some proceeding pending before it, have the

authority to treat both the persons and property as constructively present and subject to its jurisdiction. The power which a state court may exert in a particular contingency affords no basis for the assumption that the act of Congress extends to a subject which the language of the act does not embrace." *Chase* v. *Wetzlar*, 225 U. S. 79, 32 S. Ct. 659, 56 L. ed. 990.

"Section 57 (of the Judicial Code (28 U. S. C. A., para. 118)) provides for constructive service of process by service of publication of a warning order and hence cannot apply to actions *in personam* where jurisdiction over the person of the defendant is essential.[8] ([8]*Kansas Gas & E. Co.* v. *Wichita Natural G. Co.* (C.C.A. 8), 266 F. 614, 617; *Jones* v. *Gould* (C.C. Ohio), 141 F. 698, *Id.* (C.C.A. 6), 149 F. 153; *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565.)

"The presence of the property, real or personal, within the district of suit is essential to the exercise of the limited jurisdiction conferred by Section 57. *Critchton* v. *Wingfield*, 258 U. S. 66, 74, 42 S. Ct. 229, 66 L. Ed. 467; *Chase* v. *Wetzlar*, 225 U. S. 79, 86, 32 S. Ct. 659, 56 L. Ed. 990." *Wilhelm* v. *Consolidated Oil Corp.*, 84 F. (2d) 739.

(b) The federal court had no jurisdiction of the asserted cause of action because of the prior judgment and decree of the state court.

As previously stated, when the decree of the United States District Court was entered the issues had been concluded by a prior judgment of the County Court decreeing heirship and ordering distribution and by a judgment of the County Court in a direct attack upon its decree of heirship wherein the identical issues were considered and passed upon by the County Court. Authorities hereinabove cited show that under the Constitution and

laws of Oklahoma it is settled that exclusive original jurisdiction of probate matters is vested in the County Court and that jurisdiction of the state courts of general jurisdiction is appellate only.

Equally well settled in the federal courts is the proposition that where a cause has been determined in a state court of original jurisdiction and is pending on appeal in the state tribunals, federal jurisdiction cannot attach other than by an appeal to the courts of last resort of the state and thence to the Supreme Court of the United States upon writ of error or certiorari and even here the subject matter reviewable is expressly limited by federal law. The inferior courts have failed to note the distinction between appellate and original jurisdiction of federal district courts, obviously designed to prevent complications such as disclosed by the record. 28 U. S. C. A. 344 (Judicial Code, Sec. 237, amended) governs. So far as material the section reads:

> "*Appellate jurisdiction of decrees of state courts; certiorari.* (a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error.
> * * *
>
> (b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judg-

ment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; * * * the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; * * *."

The federal courts do not have general appellate jurisdiction but limited jurisdiction under this section. *Waters-Pierce Oil Co.* v. *Texas* (Tex. '09), 212 U. S. 86, 29 S. Ct. 220, 53 L. ed. 417; *Roller* v. *Murray,* 234 U. S. 738, 37 S. Ct. 902, 59 L. ed. 1570. The latter case holds that the proper mode of obtaining a review of a decision of a state court is not by attacking the judgment collaterally but by prosecution of a writ of error under the Judicial Code, para. 237.

An adjudication in a state court, whether right or wrong, precludes the parties until it has been reviewed or set aside. *County of Scotland* v. *William Hill,* 132 U. S. 107, 10 S. Ct. Reps. 86, 33 L. ed. 261; *Tioga Ry. Co.* v. *B. & C. R. R. Co.,* 20 Wall. 137, 22 L. ed. 331; *Houston* v. *Moore,* 5 Wheat. 1, 5 L. ed. 19; *Mitchell* v. *First National Bank,* 180 U. S. 471, 21 S. Ct. 418, 45 L. ed. 627.

In the case last cited an attempt by the real parties in interest was made first to litigate a claim in the state courts while the same cause of action was pending in the federal courts and thereafter to assail collaterally the judgment of the state court. The law required presentation of the matter to the state court as a condition precedent to

assertion of an interest in an estate there being administered. Conflicting determinations of state courts regarding the same issue further complicated the rights of the parties. Touching the situation, this court say:

"In the view we take of this case it is not necessary to inquire whether the liability of Mrs. Mitchell under the writing of February 20th, 1891, was determinable by the laws of Connecticut or by the laws of Illinois. If, as the bank contends, that writing became a contract when delivered to the bank in Illinois, and not before, and if, as is also contended, Mrs. Mitchell was liable thereon by the laws of that state, although she was a married woman at the time of signing the writing in Connecticut where she resided, the question remains whether the parties were not concluded by the final judgment of the Hartford county superior court based upon the judgment rendered in the supreme court of errors of Connecticut. There can be no doubt that the identical question now presented—namely, as to the liability of Mrs. Mitchell on the writing in suit notwithstanding her coverture—arose in the superior court upon appeal from the allowance of the bank's claim by the probate court; and, as we have seen, the parties united in the request that the case be reserved for the advice of the supreme court of errors of Connecticut, and the latter court, upon full consideration, advised the disallowance of all and every part of the bank's claim. To that advice the superior court, as it was compelled to do by the laws of Connecticut, conformed in its final adjudication of the bank's claim. The bank then turned to the federal court as if nothing had been adjudicated in the courts of Connecticut, and sought a judgment in support of the same claim that had been rejected by the state court in the case between it and the trustee of the estate of Mrs. Mitchell.

"We are of opinion that the bank was concluded by the judgment in the state court. In the recent

case of *Southern P. R. Co.* v. *United States*, 168 U. S. 1, 48, 42 L. ed. 355, 376, 18 Sup. Ct. Rep. 18, 27, we said, after an extended examination of the adjudged cases, that a 'right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect to all matters properly put in issue and actually determined by them.' The authorities cited in the margin illustrate the rule.

"It is said that the question here presented was one of general jurisprudence, involving the rights of citizens of different states, and that the circuit court was not bound to accept the views of the state court, but was at liberty, indeed under a duty, to follow its own independent judgment as to the legal rights of the parties. *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10. If it were true that the question was in whole or in part one of general law, the thing adjudged by the state court, when properly brought to the attention of the circuit court, would still be conclusive between the same parties or their privies. Whatever may be the nature of a question presented for judicial determination—whether

depending on federal, general, or local law—if it be embraced by the issues made, its determination by a court having jurisdiction of the parties and of the subject-matter binds the parties and their privies so long as the judgment remains unmodified or unreversed." *Mitchell* v. *First National Bank, supra.*

Even before the County Court's judgment became final, subject only to reversal or modification upon appeal, the court having first acquired jurisdiction was entitled to proceed. *Wabash R. Co.* v. *Adelbert College,* 208 U. S. 38, 52 L. ed. 379; *Peck* v. *Jenness,* 7 How. 612, 12 L. ed. 841; *Sharon* v. *Terry* (C.C.), 13 Sawry. 387, 36 F. 337, 131 U. S. 40, 33 L. ed. 94, 9 Sup. Ct. Rep. 705.

Unseemingly conflicts in authority between state and federal authority should be avoided. *Looney* v. *Western Texas R. R. Co.,* 274 U. S. 214, 62 L. ed. 1084, 38 Sup. Ct. Rep. 460; *Penn. General Casualty Co.* v. *Penn.,* 294 U. S. 189, 79 L. ed. 850, 55 Sup. Ct. Rep. 386.

The federal judiciary has no control over questions, when once the state courts have acquired jurisdiction, until the state has finally exhausted its judicial power over them by a final decision in the highest tribunal. 14 Am. Jur., Sec. 249, p. 445, citing *U. S.* v. *Bank of N. Y. & T. Co.,* 296 U. S. 463, 80 L. ed. 331, 56 S. Ct. 343; *State* v. *Bachelder,* 5 Minn. 223 Gil. 178, 80 Am. Dec. 410. Annotation: 5 L. R. A. 222.

In the former case it was decided that a federal court should refuse to entertain a suit even where brought by the United States and involving federal questions where a proceeding for its determination was pending in the state court; that even where federal court had acquired jurisdiction prior to the state proceedings, the character

and adequacy of the remedy of the latter proceedings in relation to the administration of assets within the estate and the status of those assets might require that jurisdition of the federal court be relinquished in favor of the state administration.

> "The principle, applicable to both federal and state courts, that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted. It applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature, where, to give effect to its jurisdiction, the court must control the property. *Farmers' Loan & T. Co.* v. *Lake Street Elev. R. Co.*, 177 U. S. 51, 61, 44 L. ed. 667, 671, 20 S. Ct. 564. If the two suits are *in rem* or *quasi in rem*, so that the court must have possession or control of the *res* in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. *Penn General Casualty Co.* v. *Pennsylvania*, 294 U. S. 189, 195, 79 L. ed. 850, 855, 55 S. Ct. 386. This principle is applied in the discharge of the long recognized duty of this court to give effect to such 'methods of procedure as shall serve to conciliate the distinct and independent tribunals of the states and of the Union, so that they may cooperate as harmonious members of a judicial system co-extensive with the United States.' *Taylor* v. *Carryl*, 20 How. 583, 595, 15 L. ed. 1028, 1032. See, also, *Peck* v. *Jenness*, 7 How. 612, 625, 12 L. ed. 841, 846; *Buck* v. *Colbath*, 3 Wall. 334, 341, 18 L. ed. 257, 260; *Wabash R. Co.* v. *Adelbert College*, 208 U. S. 38, 54, 52 L. ed. 379, 386, 28 S. Ct. 182; *Palmer* v. *Texas*, 212 U. S. 118, 129, 53 L. ed. 435, 439, 29 S. Ct. 230; *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 77, 89, 67 L. ed 871, 876, 43

S. Ct. 480; *Harkin* v. *Brundage*, 276 U. S. 36, 43, 72 L. ed. 457, 460, 48 S. Ct. 268." *U. S.* v. *Bank of New York and Trust Co., supra.*

(c) The U. S. District Court of the Northern District had no venue of the parties.

Neither the surety nor the defendant Kelleam were residents of nor served within the Northern District. In *Employers' Reinsurance Corp.* v. *Bryant*, 299 U. S. 374, 57 S. Ct. 273, 81 L. ed. 289, a citizen of Texas sued a corporate citizen of Missouri in a state court of Gregg County, Texas, to recover in excess of $3,000, exclusive of interest and costs, upon a workmen's compensation insurance policy, and caused process to be issued and served upon an alleged agent of the defendant. Proof was submitted that the alleged agent was not an agent in fact and the service set aside, after which process was issued and served upon the defendant within the Western—not Eastern—District of Texas. The defendant appearing specially challenged service because made outside the court's territorial jurisdiction. Regarding the validity of such service, this court say:

"The suit was *in personam* and not within any exceptioned provision empowering the federal court to send its process outside its district. Therefore that court's process could be effectively served only within the district. *Toland* v. *Sprague*, 12 Pet. 300, 328-330, 9 L. ed. 1093, 1104, 1105; *New York L. Ins. Co.* v. *Bangs*, 103 U. S. 435, 439, 440, 26 L. ed. 580-582; *Munter* v. *Weil Corset Co.*, 261 U. S. 276, 279, 67 L. ed. 652, 654, 43 S. Ct. 347; *Robertson* v. *Railroad Labor Bd.*, 268 U. S. 619, 622, 623, 69 L. ed. 1119, 1121, 45 S. Ct. 621. But the state court was not subject to such a limitation and could send its process to any part of the state." *Employers Reinsurance Corp.* v. *Bryant, supra.*

(d) The suit was not a local action under 28 U. S. C. A., Secs. 116-118.

The surety had no lien upon the decedent's estate by contract or otherwise. The surety did not seek to establish a lien or interest in any part of decedent's estate to satisfy any claim of its own, but to have the distributees, Kelleam and Southard, account to the half-blood claimants. The terms of the decree show no relief *in rem* awarded the surety. Relief granted the surety was *in personam*—that the petitioners here account to the half-blood claimants and exonerate the surety on its bond (R. 78-83).

Both the Second and Fifth Circuit Courts of Appeal have held such a suit to be transitory. *Wilson* v. *Beard* (C.C.A. 5th, N. Y.), 26 Fed. (2d) 860. (This case is so clearly in point and the facts so nearly the same it is set out in full in the appendix (pp. 66 to 78, for it shows clearly the conflict between the Tenth and the Second Circuits). *Findley* v. *Florida East Coast Ry. Co.* (C.C.A. Fla. 1934), 68 F. (2d) 540, aff. (D. C. 1933) 3 F. Supp. 393, and cert. den. (1934) 54 S. Ct. 629, 292 U. S. 623, 78 L. ed. 1478.

The fifth syllabus to the last case reads:

> "Suit to impress equitable lien on testamentary trust estate held not 'local suit,' so as to permit bringing in absent defendants, where suit was not to establish lien on property within district, but was action *in personam* to compel trustees' action regarding trust (Jud. Code, Sec. 57—28 U. S. C. A., Sec. 118)."

Even an earlier decision in the Tenth Circuit is contrary to the rule announced in the case at bar. In *Wells*

v. *Helms* (C.C.A. 10th), 105 F. (2d) 402, after final adjudication of heirship in the County Court of Oklahoma County and after the administrator was discharged, a Mrs. J. N. Wells brought to trial an action against the administrator and other heirs to recover a share in the estate. The opinion points out that "on July 9, 1938, the administrator was finally discharged," and that this discharge was set up in the amended answer, filed Sept. 20, 1938. The court in the opinion say:

> "In *Commonwealth Trust Co* v. *Bradford, supra,* the court said (297 U. S. 613, 56 S. Ct. 602, 80 L. Ed. 920):
>
> > " 'Such proceedings are not *in rem*; they seek only to establish rights; judgments therein do not deal with the property and order distribution; they adjudicate questions which precede distribution.'
>
> "Here the prayer of the complaint is too broad. Wells seeks a judgment against the administrator in his representative capacity for $6,666.67, and prays that the administrator be ordered to pay that amount to her as her portion of Wells' distributive share of Helms' estate. To grant the relief prayed for would interfere with the administration of Helms' estate in the county court and disturb its possession.
>
> "However, if the prayer of the complaint could be construed as asking for nothing more than a determination of the distributive share of Wells in Helms' estate, the result would be the same."

In the case at bar where the substantial controversy is identical, the opinion of the Circuit Court treats the action as *local,* and applies Section 116, 28 U. S. C. A. to fix jurisdiction and venue in the northern district.

It should be observed also that in the *Wells* v. *Helms* case, in which as here an administrator had been finally discharged, it was decided that to proceed would interfere with the administration of the estate by the County Court and disturb its possession. In the case at bar it is stated by the Circuit Court that:

> "No attempt is made to interfere with the administrator in possession of the estate or with the administration of the estate by the court. The estate has been administered, the estate has been distributed to those claiming to be heirs * * *."

If this action be local, as decided in *Wells* v. *Helms*, neither venue nor jurisdiction in the Northern District of Oklahoma exists. In considering the nature of the action particular attention is invited to the circumstance that a great deal of the property was notes and cash and other personalty, the situs of which was not established in the record.

The jurisdiction to enforce a lien given by this section means a lien existing anterior to the suit and not one caused by the institution of the suit itself. *Dormitzer* v. *Ill., etc., Bridge Co.* (C.C.A. Mass. 1881), 6 F. 217; *Albert* v. *Bascom* (D. C. Tex. 1917), 245 F. 149.

A creditor cannot, where he was given no lien by contract, justify maintenance of suit in District Court other than in district of residence on the ground that it was to enforce a lien upon specific personal propery in the district. *Bank of Commerce & Trust of Richmond, Va.* v. *McArthur* (D. C. Fla.), 248 F. 138; *Vidal* v. *South American Securities Co.* (C.C.A. N. Y. 1922), 276 F. 855; *Shainwald* v. *Lewis* (D. C. Neb.), 5 F. 510, affirmed 2 S. Ct. 385, 108 U. S. 158, 27 L. ed. 691.

(e) The bill stated no cause of action within either the legal or equitable jurisdiction of the court.

The Act of March 3, 1875 (18 Stat. at L. 472, chap. 137, Sec. 5; Judicial Code, Sec. 37, U. S. C. A., title 28, Sec. 80), provides that if in any suit commenced in a federal district court it shall appear to the satisfaction of the court that such suit does not really and subsantially involve a dispute or controversy properly within its jurisdiction, or that the parties to such suit have been improperly or collusively made or joined for the purpose of creating a cognizable case, the court shall proceed no further therein, but shall dismiss the suit. *McNutt* v. *General Motors Accept. Corp.*, 298 U. S. 178, 56 S. Ct. 780, 80 L. ed. 1135.

The effort is here made to sustain jurisdiction under the equity powers of the court upon the theory that the bill states an action in the nature of a bill *quia timet.* No case can be found where such a contention under facts as here has ever been sustained. Cases from other jurisdictions are not in point, for the matter is governed by local law.

The Oklahoma statutes in certain exceptional cases authorize a surety to maintain an action against his principal for indemnity against the liability for which he is bound before it is due. The section reads:

> "A surety may maintain an action against his principal, to obtain indemnity against the debt or liability for which he is bound, before it is due, whenever any of the grounds exist upon which, by the provisions of this code, an order may be made for arrest and bail, or for an attachment. (R. L. 1910, Sec. 5308.)" 12 O. S. A. 1108.

But this section has no application where the surety has been discharged by two judgments and is merely tendering a feigned issue in an effort to invoke federal jurisdiction. The right to maintain such a suit is clearly limited by the words "whenever any of the grounds exist upon which, by the provisions of this code, an order may be made for arrest and bail, or for an attachment."

Under the Oklahoma code no order may be made for the arrest of any person save where a verified complaint charging a public offense is laid before a magistrate. The applicable section reads:

> "When a complaint, verified by oath or affirmation, is laid before a magistrate, of the commission of a public offense, he must, if satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, issue a warrant of arrest. (R. L. 1910, Sec. 5629.)" 22 O. S. A. 171.

Note also Const., Art. 2, Sec. 30, which reads:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized."

And an order for an attachment may only be made in actions for the recovery of money and where there has been presented to the clerk of some court in which an action has been filed an affidavit showing the nature of the claim, that it is just, the amount due, and the existence of some particular ground of attachment specified in 12 O. S. A. 1151.

"The order of attachment shall be issued by the clerk of the court in which the action is brought, in any case mentioned in the preceding section, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing:

First. The nature of the plaintiff's claim;

Second. That it is just;

Third. The amount which the affiant believes the plaintiff ought to recover; and,

Fourth. The existence of some one of the grounds for an attachment enumerated in the preceding section. (R. L. 1910, Sec. 483.)" 12 O. S. A., Sec. 1152.

So far as material here, Section 1151, O. S. A., to which reference is made, provides:

"The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated:

1. When the defendant, or one of several defendants, is a foreign corporation, or a non-resident of this state (but no order of attachment shall be issued on the ground or grounds in this clause stated for any claim other than a debt or demand arising upon contract, judgment or decree, unless the cause of action arose wholly within the limits of this state, which fact must be established on the trial)."

Clearly these sections do not authorize maintenance of any such suit as herein attempted, for:

1. No order of arrest could issue for no complaint had been filed nor crime committed.

2. The action is not for the recovery of money and attachment is unauthorized.

A party can ask no greater relief in equity in the courts of the United States than he could obtain were he to resort to the state courts. If in the latter courts equity would afford no relief, neither will it in the former. *Ewing* v. *St. Louis,* 5 Wall. 413, 72 U. S. 808, 14 L. ed. 657; *Blythe* v. *Hinckley* (Cal. 1899), 19 S. Ct. 497, 173 U. S. 501, 43 L. ed. 783; *Sutton* v. *English,* 246 U. S. 199, 38 S. Ct. 254, 62 L. ed. 664. But it is clear from the foregoing that the surety had no cause of action either at law or in equity.

V. It was the duty of the court to sustain motion to dismiss both the bill and the cross-petition at the trial for want of jurisdiction for:

(a) The burden was upon the persons asserting jurisdiction in the federal court for diversity of citizenship to establish diversity, which was not done.

The Circuit Court concedes the allegation of residence in the pleadings and evidence is not equivalent to an allegation of citizenship in the state, but asserts where the averment of residence was intended to mean and, reasonably construed, must be interpreted as meaning, that the party is a citizen of a state, it is sufficient. But in analyzing the facts the court limits its review to the evidence regarding residence of the *surety* and the *petitioners* herein. The *citizenship of the half-blood claimants was equally material, as the cases hereinafter cited clearly show.* The allegation as to citizenship of all except Kelleam Hall is that they "* * * *are residents and citizens of the State of Arkansas and the State of Oklahoma, the exact addresses of each this plaintiff does not know and cannot give* * * *" (R. 5). The proof was that "all * * * *half-brothers and sisters live in either Oklahoma,*

Arkansas or California'' (R. 109). The allegation of the petition was traversed in the answers (R. 50).

The court's findings were generally that there was a diversity of citizenship between the Maryland Casualty Company and the defendants and cross-petitioners (R. 68), but specifically that the *residences* of the half-blood claimants were Milwaukee, Wisconsin, Yorbalinda, California, Santa Anna, California, Long Beach, California, Fort Smith, Arkansas, Galveston, Texas, Los Angeles, California, Alhambra, California, Waldron, Arkansas, Fayetteville, Arkansas, Blanchard, Oklahoma, Amarillo, Texas, Oklahoma City, Oklahoma. Robert Kelleam's *residence* was found merely to be ''Texas'' and there was no finding as to the *residence* of Kelleam Hall. These residences are in the main supplied by counsel who drew the journal entry. They were not established by any evidence.

In view of this confused state of the record, this case cannot be brought under the rule in *Sun Printing and Publishing Assn.* v. *Edwards,* 194 U. S. 377, 24 S. Ct. 696, 48 L. ed. 1027.

In that case the jurisdictional issue turned upon the sufficiency of detailed evidence regarding the citizenship of Edwards, the plaintiff. Regarding the law the court say:

> ''Had the transcript shown nothing more as to the status of Edwards than the averment of the complaint that he was a 'resident of the state of Delaware,' as such an averment would not necessarily have imported that Edwards was a citizen of Delaware, a negative answer would have been impelled by prior decisions. *Mexican C. R. Co.* v. *Duthie,* 189 U. S. 76, 47 L. ed. 715, 23 Sup. Ct. Rep. 610; *Horne*

v. *George H. Hammond Co.*, 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep. 167; *Denny* v. *Pironi*, 141 U. S. 121, 35 L. ed. 657, 11 Sup. Ct. Rep. 966; *Robertson* v. *Cease*, 97 U. S. 646, 24 L. ed. 1057. The whole record, however, may be looked to, for the purpose of curing a defective averment of citizenship, where jurisdiction in a federal court is asserted to depend upon diversity of citizenship, and if the requisite citizenship is anywhere expressly averred in the record, or facts are therein stated which, in legal intendment, constitute such allegation, that is sufficient. *Horne* v. *George H. Hammond Co.*, 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep. 167, and cases cited."

The court from the evidence which was direct and positive (but with three justices dissenting) found sufficient proof of citizensip from the facts that (1) the complaint averred and the answer admitted that the plaintiff was a resident of the State of Delaware. (2) The plaintiff testified: "One of the reasons I left the New Haven Palladium (place of employment in New York) was that it was too far away from home. I live in Delaware and I had to go back and forth. My family were over in Delaware."

No question of jurisdiction was raised in the trial or by assignment of error, and this court adjudged the proof there sufficient.

In the case at bar the court's findings and the allegations of the pleadings and the proof are in hopeless confusion even as to the facts regarding the place of *residence* of the several respondents, except the surety. Contrary to the assertion in the opinion of the Circuit Court the petitioners' complaint is not limited to their own citizenship and that of the surety. (See assignment of errors R. 1.)

The Constitution, Art. 3, Sec. 2, provides:

> "The judicial power shall extend to all cases in law and equity * * * between citizens of different states * * *."

> "But it has long since been settled that residence and citizenship were wholly different things within the meaning of the Constitution and the laws defining and regulating the jurisdiction of the circuit courts of the United States; and that a mere averment of residence in a particular state is not an averment of citizenship in that state for the purpose of jurisdiction." *Steigleder* v. *McQuesten*, 49 L. ed. 987, 198 U. S. 143, 25 S. Ct. 616.

To the rule announced Mr. Justice Harlan cites:

Parker v. *Overman*, 18 How. 137, 15 L. ed. 318.
Robertson v. *Cease*, 97 U. S. 646, 24 L. ed. 1057.
Everhart v. *Huntsville Female College*, 120 U. S. 223, 30 L. ed. 623, 7 Sup. Ct. Rep. 555.
Timmons v. *Elyton Land Co.*, 139 U. S. 378, 35 L. ed. 195, 11 Sup. Ct. Rep. 585.
Denny v. *Pironi*, 141 U. S. 121, 123, 35 L. ed. 657, 658, 11 Sup. Ct. Rep. 966.
Wolfe v. *Hartford Life & Annuity Ins. Co.*, 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602.

Under the Oklahoma law the answer put in issue the allegation of jurisdictional as well as non-jurisdictional facts. 12 O. S. A. 269 (R. L. Sec. 4742). The answer does not waive such questions even where not traversed, but they may be raised at any stage of the proceedings. *Antene* v. *Jensen*, 47 Okla. 352, 148 Pac. 727; *Blake* v. *Metz*, 136 Okla. 150, 276 Pac. 765; *Zahn* v. *Obert*, 60 Okla. 118, 159 Pac. 298.

The cases of *Anderson* v. *Watt*, 138 U. S. 694, 11 S. Ct. 449, 34 L. ed. 1078, and *Desmare* v. *U. S.*, 93 U. S. 605, 23 L. ed. 959, do not support the Circuit Court's statement that proof of residence at a given place shifts the burden of proof as to citizenship. The point appears not to have been considered in either case. On the contrary in *Anderson* v. *Watt* the following language appears:

> "Under the Act of March 3, 1875, determining the jurisdiction of circuit courts of the United States (18 Stat. 472), the objection to the jurisdiction upon a denial of the averment of citizenship is not confined to a plea in abatement or a demurrer, but may be taken in the answer, and the time at which it may be raised is not restricted. Although the averment as to citizenship may be sufficient, yet, if it appear that that averment is untrue, it is the duty of the circuit court to dismiss the suit; and this court, on appeal or writ of error, must see to it that the jurisdiction of the circuit court has in no respect been imposed upon. *Morris* v. *Gilmer*, 129 U. S. 315, 325 (32:690, 693); *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.*, 136 U. S. 356, 374 (34:363, 367); *Cameron* v. *Hodges*, 127 U. S. 322, 325 (32:132, 133).
>
> "Although the Fourteenth Amendment declares all citizens of the United States to be citizens 'of the state where they reside,' yet as the jurisdiction of the Circuit Court is limited in the sense that it has none except that conferred by the Constitution and laws of the United States, and the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears, it is essential that in cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctively and positively averred in the pleadings, or should appear affirmatively with equal distinctness in other

parts of the record. It is not sufficient that jurisdiction may be inferred argumentatively from the averments. *Robertson* v. *Cease,* 97 U. S. 646, 649 (24:1057, 1058); *Brown* v. *Keene,* 33 U. S. 8 Pet. 112, 115 (8:885, 886). It was therefore held in *Robertson* v. *Cease, supra; Continental Ins. Co.* v. *Rhoads,* 119 U. S. 237 (30:380); *Menard* v. *Groggan,* 121 U. S. 253 (30:914), and other cases, that the averment that the parties to the cause were 'residents' in different states, respectively, was not enough. * * *."

(b) There was no complete diversity of citizenship between the real parties in interest as required by 28 U. S. C. A. 111-112.

The real parties in interest were the claimants to a share of the estate. At most the surety sought only to have the heirs compose their differences for fear in some manner and at some time it might become involved in a suit growing out of the bond. Since in any suit upon the bond the principal, E. A. Kelleam, and the surety would be aligned in interest against the heirs, it was the duty of the court in order to test its jurisdiction to realign the parties in accordance with their actual interests.

> "If in any suit commenced in a district court * * * of the United States, it shall appear * * * at any time * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties * * * have been improperly or collusively made or joined * * * for the purpose of creating a case cognizable * * * the said district court shall proceed no further therein but shall dismiss the suit * * *." 28 U. S. C. A., Sec. 80.

To sustain jurisdiction in federal courts because of diversity of citizenship, all parties on one side must be citizens of different states from all parties on the other side. *Edwards, et al.* v. *Glasscock, et al.*, 91 F. (2d) 625.

> "As respects jurisdiction based on diversity of citizenship, district court was required to look beyond pleadings and arrange parties according to their actual sides in dispute." *Edwards, et al.* v. *Glasscock*, citing *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 25 S. Ct. 420, 49 L. ed. 713.

From the latter case a bill in equity was brought in the federal court by the mortgagee of a water works company to restrain the city in which the company supplied water from building a new set of water works and to compel it specifically to perform a contract with the company to pay it or its mortgagee a specified sum for the use of water. The trust company was a Pennsylvania corporation and federal jurisdiction was asserted for diversity of citizenship. The water works company was made a defendant. The answer averred that the real purpose of the proceeding was to invoke federal jurisdiction in an effort to avoid the effect of decision by the Supreme Court of the state to the effect that the contract relied upon was void. If mortgagor and mortgagee, both interested in obtaining the relief sought, were enjoined as plaintiff there would be no diversity of citizenship; the effort was made to make the mortgagor a defendant along with the city. This court say:

> "We are of opinion that the bill should have been dismissed for want of jurisdiction. The water-works company is admitted to have been a necessary party, and it, like the defendant city, was a Georgia corporation. It was made a defendant, but the court will look beyond the pleadings, and arrange the par-

ties according to their sides in the dispute. When that is done, it is obvious that the waterworks company is on the plaintiff's side, and was made a defendant solely for the purpose of reopening, in the United States court, a controversy which had been decided against it in the courts of the state. There was a pretense of asking relief against it, as we have stated, but no foundation for the prayer was laid in the allegations of the bill. On the contrary, it appears from those allegations that the waterworks company insisted on its contract with the city, and did everything in its power to carry the contract out. It also recognized the plaintiff's right to receive the rentals, and yielded to its demand. No difference or collusion of interest or action is alleged or even suggested. If we assume that the plaintiff is more than an assignee of the city's contract to pay (which we do not intimate), still, when the arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist, the device cannot be allowed to succeed. See Removal Cases (*Meyer* v. *Delaware R. Constr. Co.*), 100 U. S. 457, 469, 25 L. ed. 593, 598; *Hawes* v. *Oakland* (*Hawes* v. *Contra Costa W. Co.*), 104 U. S. 450, 453, 26 L. ed. 827, 829; *Detroit* v. *Kean*, 106 U. S. 537, 541, 27 L. ed. 300, 302, 1 Sup. Ct. Rep. 560; *Doctor* v. *Harrington*, 196 U. S. 579, ante, 606, 25 Sup. Ct. Rep. p. 355. Act March 3, 1875 (18 Stat. at L. 472, chap. 137, sec. 5, U. S. Comp. Stat. 1901, p. 508)."

To the same general rule is *McNutt, Governor,* v. *General Motors Acceptance Corp. of Indiana,* 298 U. S. 178, 80 L. ed. 1135.

When the parties to the suit at bar are arranged in accordance with their actual interest, it is apparent that the controversy involves residents of the State of Okla-

homa, both as plaintiffs and defendants, and that therefore there was no jurisdiction in the District Court. *Gaddies, et al.* v. *Junker* (D. C.), 27 F. (2d) 156; *De Graffenreid* v. *Yount-Lee Oil Co.* (C. C. A.), 30 F. (2d) 574; *Mitchell* v. *Maurer*, 293 U. S. 237, 55 Sup. Ct. 162, 79 L. ed. 338.

(c) The relief prayed and granted was *in personam* against non-residents of the Northern District and was beyond the jurisdiction of the court.

1. *The petitioners were neither inhabitants of nor found within the Northern District in which the suit was brought and who did not voluntarily appear and as to them the decree is void.*

For venue in the Northern District, as above noted, respondents depended solely upon the circumstance that Francis Kelleam, who resided in Sallisaw, Sequoyah County, which is in the Eastern District (28 U. S. C. A. 182) of Oklahoma, was *served* in the Northern District.

Title 28, Sec. 111, U. S. C. A. (Jud. Code Sec. 50) reads:

> "*When part of several defendants can not be served.* When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhab-

itants of nor found within the district, as aforesaid, shall not constitute matter or abatement or objection to the suit (R. S. Sec. 737; Mar. 3, 1911, c. 231, Sec 50, 36 Stat. 1101)."

Title 28, U. S. C. A., Sec. 118, provides:

"*Absent defendants* * * *. When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon * * * real or personal property within the district where the suit is brought, one or more of the defendants shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto * * *. It shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication * * * but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same state, such suit may be brought in either district in said state."

The court below in its decree assumed authority in what it treated as a local action upon non-resident service where there was no complete diversity of citizenship:

1. To vacate a decree of heirship.

2. To direct an accounting.

3. To determine personal liability of an administrator upon a judicial bond without any service upon the administrator.

4. To establish and foreclose a lien to satisfy an accounting not concluded.

5. To vacate conveyances without service upon the grantees.

6. To void a judgment of the County Court determining the same issue.

7. To appoint a receiver for a decedent's entire estate consisting of real and personal property where no proof was offered to show its situs within the state or district.

The case was not one where venue was waived for want of venue was urged uniformly throughout the proceedings (R. 1-43-50-57), and to avoid possibility of waiver, defendants stood on their pleas to jurisdiction and venue at the trial (R. 113).

Whenever a decree cannot be made without prejudice to one not a party, the bill must be dismissed. *Fourth Nat. Bank* v. *New Orleans & C. R. Co.* (La. 1871), 11 Wall. 624, 20 L. ed. 82; *Herndon* v. *Ridgeway* (Miss. 1855), 17 How. 424, 15 L. ed. 100. All partners were held indispensable in a suit involving partnership property in the former case; in the latter all parties claiming an interest in certain slaves were held indispensable, and where all could be served the bill was dismissed.

In a suit by one of testators to surviving children to recover one-third of the estate on the ground of the invalidity of a will, plaintiff's brother and other legatees, including the testator's sister, niece, and friend, were indispensable parties. *O'Brien* v. *Markham* (Cal.), 17 Fed. Supp. 633. To the same rule is *Shields* v. *Barrow*, 17 How. 130, 15 L. ed. 130; *Ribon* v. *R. R. Co.*, 17 Wall. 446, 21 L. ed. 367, and (in Oklahoma) *Simon* v. *Shaffer* (D. C. Okla. 1935), 11 F. Supp. 450.

2. *Because jurisdiction was predicated upon diversity of citizenship and neither plaintiff nor any defendant was a resident of the district, and objection was made by the petitioners.*

As hereinbefore noted, relief prayed and granted was *in personam*. The petitioners here were indispensable parties and no party was a resident of the district where suit was instituted.

Title 28, U. S. C. A., Sec. 112, reads in part:

"* * * (a) Except as provided in Sections 113 to 117 of this title,* no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in Sections 113 to 118 of this title, no civil suit shall be brought in any district against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

By express provision of this section jurisdiction cannot be predicated on diversity of citizenship, where

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* Neither of these exceptions apply. Sec. 113 provides for suit in the district where either of several defendants reside, where there is more than one district and all defendants reside in the state. Not applicable because (1) neither party to this case resides in the Northern District; (2) some reside without the state and foreign service is not authorized.

Sec. 114 governs venue and transfers of criminal cases between districts in the same state where one or more defendants resident in the state are involved.

Sec. 115 applies where the suit is of a local nature and the defendant a resident of another district in the same state, authorizing issuance and service of process.

Sec. 116 governs local suits where part of the property is in one district and part in another within the same state, and Sec. 117 relates to jurisdiction of a receiver where property is in the same judicial circuit but in different states.

neither party is resident of district and objection is made by the defendant.

Luckett v. *Delpark, Inc.* (N. J. 1926), 46 S. Ct. 397, 270 U. S. 496, 70 L. ed. 703.
Ladew v. *Tenn. Copper Co.* (Tenn. 1910), 218 U. S. 357, 31 S. Ct. 81, 54 L. ed. 1069.
In re Wisner (Mo. 1906), 203 U. S. 449, 27 S. Ct. 150, 51 L. ed. 264.
Foulk v. *Gray* (W. Va.), 120 Fed. 156.
Albert v. *Bascom* (D. C. Tex. 1917), 245 F. 149.

To the same effect is *Wilhelm* v. *Consolidated Oil Corp.* (C.C.A. Okla. 1936), 84 F. (2d) 739, from this Circuit.

From *Wilhelm* v. *Consolidated Oil Corp., supra,* the following is quoted:

> "There is another reason why a decree granting the primary relief must be had in a suit *in personam.* Section 57 itself provides that an adjudication thereunder shall 'affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district.' This has been treated as a substantive limitation upon the jurisdiction conferred, as well as a direction as to the character of the decree. *Ladew* v. *Tennessee Copper Co.,* 218 U. S. 357, 31 S. Ct. 81, 54 L. ed. 1069; *General Investment Company* v. *Lake Shore & M. S. Ry. Co.,* 260 U. S. 261, 280, 281, 43 S. Ct. 106, 67 L. ed. 244. See, also, *Chase* v. *Wetzlar,* 225 U. S. 79, 86, 32 S. Ct. 659, 56 L. ed. 990; *Crichton* v. *Wingfield,* 258 U. S. 66, 74, 42 S. Ct. 229, 66 L. ed. 467."

Jurisdiction of federal court in actions *in personam* is limited to district of which defendant is an inhabitant

and not affected by fact that service is had upon one party within the district.

Putnam v. *Ickes* (1935), 78 F. (2d) 223, 64 App. D. C. 339, cert. den. (1935), 56 S. Ct. 132, 296 U. S. 612, 80 L. ed. 434.

Lassig v. *Ickes* (1935), 56 S. Ct. 132, 296 U. S. 612, 80 L. ed. 434.

Dunn v. *Ickes* (1935), 56 S. Ct. 132, 296 U. S. 612, 80 L. ed. 434.

Abbott v. *Ickes* (1935), 56 S. Ct. 132, 296 U. S. 612, 80 L. ed. 434.

Hill v. *Ickes* (1935), 56 S. Ct. 132, 296 U. S. 612, 80 L. ed. 434.

Thompson v. *Ickes* (1935), 56 S. Ct. 133, 296 U. S. 612, 80 L. ed. 434.

Hull v. *Ickes* (1935), 56 S. Ct. 133, 296 U. S. 612, 80 L. ed. 434.

Fordham v. *Ickes* (1935), 56 S. Ct. 133, 296 U. S. 612, 80 L. ed. 434.

Conclusion.

For the reasons hereinabove set forth, it is respectfully submitted that the decree herein complained of and opinion of the U. S. Circuit Court of Appeals for the Tenth Circuit should be reversed with directions to dismiss the bill at the costs of the respondents and relief is respectfully prayed accordingly.

GLENN O. YOUNG,
Sapulpa, Oklahoma,
Attorney for Petitioners.

Dec. 14, 1940.

APPENDIX.

"WILSON v. BEARD, ET AL.

Circuit Court of Appeals, Second Circuit,
June 4, 1928.

No. 239.

1. *Courts—Right of action for deceased's negligence in handling estate of incompetent held not within law authorizing suit to enforce lien on property within district* (Jud. Code, Sec. 57 (28 USCA, Sec. 118)).

Right of action on unliquidated claim against estate of decedent, grounded on decedent's negligence in permitting estate of incompetent to depreciate in value during his years of management, but not charging him with misappropriation thereof, held, *in personam*, and not within Judicial Code, Sec. 57 (28 USCA, Sec. 118), authorizing suit in any District Court of United States to enforce legal or equitable lien, or to remove any incumbrance or lien or cloud on title to real or personal property within district.

2. *Executors and administrators—Creditor has right to share in debtor's estate only after claim is recognized by executor or administrator, or established by judgment.*

Under rule to effect that, where a debtor dies, his estate is impressed with a trust for benefit of his creditors, heirs, and legatees, creditor has right to share in debtor's estate only after claim is recognized by executor or administrator, or is established by judgment.

3. *Courts—Existence of property belonging to deceased within district cannot be used as basis for bringing suit on claim therein.*

Where claim against estate is not of a special nature, or differing from that of any other general creditor, or anyone having a right to sue for tort, creditor cannot, because of existence of property within district, use that as a basis for bringing suit within district against a defendant who is not an inhabitant of the district or found therein.

4. *Courts—Claim of heirs for residue does not constitute 'suit affecting property,' within law authorizing jurisdiction of court within district where property is located* (Jud. Code, Sec. 57 (28 USCA, Sec. 118)).

Claim of heirs, suing a trustee to recover residue of an estate, does not constitute a suit affecting real or personal property within district, within meaning of Judicial Code, Sec. 57 (28 USCA, Sec. 118), authorizing suit to enforce lien on or remove incumbrance, lien, or cloud on title to property within district where suit is brought.

5. *Courts—Parties have personal immunity from suit in any district other than one where either of parties reside* (Jud. Code, Sec. 51 (28 USCA, Sec. 112)).

Under Judicial Code, Sec. 51 (28 USCA, Sec. 112) parties to suit in federal court have personal immunity from suit in any district other than the one where either of parties reside.

6. *Courts—Personal residence controls in determining federal court jurisdiction.*

In determining residence of parties for purpose of federal court jurisdiction, the place of parties' personal residence controls, as distinguished from official residence.

7. *Appearance—Appearance, limited to motion to dismiss, did not constitute waiver of right to ask for dismissal.*

Where appearance of defendant was limited to motion to dismiss, without seeking to raise question as to merits, there was no waiver of right to ask for dismissal.

8. *Equity—Failure to move to set aside service of subpoena held not waiver of right to ask for dismissal.*

Failure to move to set aside service of subpoena *held* not waiver of right to ask for dismissal for lack of jurisdiction; such relief being obtainable by special appearance and motion to dismiss, without asking to vacate service of process.

9. *Equity—Bill seeking recovery for deceased's negligence in handling incompetent's funds held improperly dismissed, as to person within district, on ground non-resident executor was necessary party.*

Bill against executor, seeking recovery on ground of deceased's negligence in handling assets of incompetent, brought in district wherein property belonging to deceased was located, and alleging possession by another defendant of certain sums of money belonging to such incompetent, title to which is claimed by plaintiff, *held* improperly dismissed as to such third person, claimed to have possession of funds and residing within district on ground that executor, who was a nonresident, was a necessary party.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by John Taylor Wilson, as conservator and as committee of the estate of Philip A. Meyer, an incompetent, against Charles Coleman Beard, as ancillary executor

cum testamento annexo of the estate of Hugo R. Meyer, deceased, and others, to determine an amount due to the plaintiff, and to have a lien on the assets of the decedent's estate established, declaring that funds in the hands of and under control of the defendants were held in trust for the payment of a debt due the plaintiff. Decree of dismissal, and plaintiff appeals. Affirmed in part, and in part reversed and remanded.

Patterson, Eagle, Greenough & Day, of New York City (Edward J. Patterson and Carroll G. Walter, both of New York City, of counsel), for appellant.

Everett, Clarke & Benedit, of New York City (Herman S. Hertwig and Walter C. Elliott, both of New York City, of counsel), for appellees.

Before Manton, Swan and Augustus N. Hand, Circuit Judges.

Manton, Circuit Judge. The bill of complaint alleges that Henry Meyer died in 1905, a resident of Denver, Colo., leaving three children, a son, Philip A. Meyer, for whom the plaintiff has been appointed conservator and a committee of his estate, because of his incompetency, and another, Hugh R. Meyer, who has since died, and of whose estate the defendant, Charles Coleman Beard, has been named ancillary executor *cum testamento annexo*.

By his will, Henry Meyer left his estate in equal shares to his three children, and Hugo R. Meyer was named and qualified as executor, and administered the estate until May, 1927, when he filed his account and was discharged. Philip A. Meyer obtained securities of approximately $100,000 from his father's estate, and Hugo R. Meyer became a self-constituted agent or trustee for Philip A. Meyer, depositing the securities with the

predecessor of the appellee, Bankers' Trust Company. The bill alleges that in 1907 Philip A. Meyer was incompetent, but no guardian, committee, or conservator was appointed until the appellant was appointed on December 5, 1923. During this period, Hugo R. Meyer had personal charge and managed the properties of Philip A. Meyer. It is alleged that, with one exception, none of the bonds among Philip A. Meyer's securities were legal investments for trustees, and that this bond of a railroad company was purchased for Philip's account by Hugo after his father's death. For years prior to 1923, Hugo and Philip Meyer resided in the state of Victoria, Australia, where Hugo Meyer died on January 15, 1923, leaving a will which was probated in the Supreme Court of Victoria. His wife was named as executrix, and among the assets of his estate were stocks and bonds of the approximate value of $71,000, which were found in the possession of the Bankers' Trust Company. There was some personal property in Australia. In May, 1924, Hugo Meyer's wife was appointed ancillary executrix of the estate by the Surrogate's Court of New York County, and acted as such until she died, a resident of Oklahoma, on June 22, 1926.

As ancillary executrix, she advertised for claims, and the appellant presented his claim on behalf of Philip A. Meyer. The allegation is that on December 5, 1923, the probate court of Cook County, Illinois, appointed John Taylor Wilson conservator of Philip A. Meyer's estate, and on February 5, 1924, he was appointed committee by the Supreme Court of New York County. As such conservator and committee, the appellant received from the Bankers' Trust Company the securities composing the estate of Philip A. Meyer, then having a market value of

$43,000. The bill charges that the estate of Hugo R. Meyer is liable to the estate of Philip A. Meyer in the sum of $58,000, the difference between the market value of the securities received by the appellant from the Bankers' Trust Company, and the market value of the securities distributed to Philip A. Meyer from his father's estate in 1907. It is claimed, also, that income to the extent of $34,000 is due. The appellant is alleged to be the only unpaid creditor of Hugo R. Meyer's estate. When the claim was rejected by Hugo R. Meyer's widow, the appellant petitioned the Surrogate's Court of New York County to compel the ancillary executrix to settle her accounts as such executrix, to the end that the appellant's claim might be determined upon such an accounting. This application was opposed upon the ground that the Surrogate's Court was without jurisdiction to hear and determine the claim of nonresident creditors, and on June 11, 1925, the surrogate made a decree denying the appellant's petition, and directing the ancillary executrix to file an immediate accounting, and thereafter directed the transmissal of the assets to the domicilary jurisdiction (Australia) for final administration and distribution there. This result was affirmed by the Court of Appeals of the state. *In re Meyer,* 125 Misc. Rep. 361, 211 N. Y. S. 525, affirmed 216 App. Div. 735, 214 N. Y. S. 940, affirmed 244 N. Y. 598, 155 N. E. 913.

The theory upon which the appellant asserts his right to maintain this suit against a resident of Oklahoma in the Southern District of New York is that it seeks to enforce a lien against Hugo R. Meyer's estate under Section 57 of the Judicial Code (title 28, Sec. 118 of the U. S. Code (28 USCA, Sec. 118)) which provides:

'When in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur by a day certain to be designated.'

(1) The section further provides, where there is a failure to appear, for service by publication, and that the adjudication shall, as regards the absent defendant without appearance, affect only the property which has been the subject of the suit and under the jurisdiction of the court within such district. The claim here does not fall within this section. It is grounded upon Hugo R. Meyer's negligently permitting the assets of Philip A. Meyer's estate to depreciate in value during his years of management, but he is not charged with misappropriation. No claim or lien for an interest in any particular property is asserted. He has an unliquidated claim *in personam* against Hugo R. Meyer in his lifetime, and claims that it survives against his representative; further, that, when it is liquidated, a decree may be entered requiring payment out of the assets of Hugo R. Meyer's estate. But it must be paid with any other general creditor of the general estate after the expenses of administering the estate have been paid. *Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33, 44, 30 S. Ct. 10, 54 L. Ed. 80; *Security Trust Co.* v. *Black River Nat. Bank*, 187 U. S. 211, 228, 23 S. Ct. 52, 47 L. ed. 147. His right of action is *in personam*, and before he has a lien he must obtain a judgment on his claim and

reach his debtor's property in the well established way. *White* v. *Croker* (C.C.A.), 13 F. (2d) 321, 323. Consequently no jurisdiction can be acquired through the aid of Section 57.

(2) But it is argued that, if the debtor dies, the personal right is gone, and the only remaining right is against the debtor's assets. Then, it is said, the property of the debtor immediately becomes a trust fund, to which he, as a creditor of the deceased, is a beneficiary, and he has 'an equitable lien upon or claim to such property.' It is, of course, the duty of executors or administrators to pay the debts of the decedent up to the limit of the amount of the estate; but this does no change the character of the liability. The rule is that, where a debtor dies, his estate is impressed with a trust for the benefit of his creditors, heirs and legatees (*Borer* v. *Chapman*, 119 U. S. 587, 7 S. Ct. 342, 30 L. ed. 532; *Harrison* v. *Moncravie* (C.C.A.), 264 F. 776, 779; *McClellan* v. *Carland* (C.C.A.), 187 F. 915, 918). But that makes it possible to share in the debtor's estate only after the claim is recognized by the executor or administrator, or is established by judgment against the executor or administrator (*White* v. *Croker, supra*).

(3) The claim at bar in effect seeks a money recovery. It is no different. The assertion of an equitable lien does not change its character. The recovery, if one he had, necessarily is an *in personam* judgment, and must be paid out of the estate, if there be sufficient property; otherwise, it remains as a judgment of record against the executor in his representative capacity. Where the plaintiff has no special claim against the property, or any right in it, to differ from any other

general creditor, or any one having a right to sue for tort, he cannot, because of the existence of property within the district, use that as a basis for bringing his suit within it against a defendant, who is not an inhabitant of the district or found in the district. *Vidal* v. *South Am. Securities* (C.C.A.), 276 F. 855.

(4) Heirs, suing a trustee to recover a residue of an estate, are in the same position; their claim does not constitute a suit affecting real or personal property within the district. *Fayerweather* v. *Ritch* (C.C.), 89 F. 385. See, also, *Waterloo Creamery Co.* v *Nat. Bank of Commerce* (D.C.), 282 F. 197. Section 57 refers to some lien upon or claim to specific property. Other creditors against an estate, having a claim of uniform validity, are entitled to share in the estate, and a single creditor, who has no specified claim to particular property, may not have the aid of the section.

We are referred to *Hultberg* v. *Anderson* (C.C.), 170 F. 657, where the complainant had a lien by virtue of an attachment sued out and final judgment entered thereon, and he was allowed to proceed under section 57 because he had a legal lien on specific property within the district. *Dahlgren* v. *Pierce* (C.C.A.), 263 F. 841, was a suit to construe a will setting up a trust and to determine the interests in the trust fund under the will. It was a proceeding *in rem* to construe a deed to reach property and remove a cloud upon the title. The whole trust estate was before the court, to have the rights of the several parties declared. The reasoning and result in *Chase* v. *Wetzlar*, 225 U. S. 79, 32 S. Ct. 659, 56 L. ed. 990, supports appellee's position, rather than appellant's. *De Hierapolis* v. *Lawrence* (C.C.), 99 F. 321, was a

typical bill to enforce a judgment lien against certain real estate, transferred with the reservation of an annuity.

In *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565, plaintiff sought to recover back property bought by the plaintiff at a sheriff's sale as a result of a judgment against the plaintiff who was the defendant in that action. The plaintiff challenged the validity of the judgment in a prior action. In that action, this plaintiff was a nonresident defendant with real property, the subject of the present suit, in Oregon. The plaintiff therein sued the defendant, without the state, by an order of publication, in a personal action, for legal services, without attachment of property or seizure thereof by the court. The plaintiff therein obtained judgment and levied execution on the defendant's property, and at the sheriff's sale the present defendant bought in the property. The court, in the present suit, gave judgment for the plaintiff on the ground that the judgment in the prior action was invalid, and hence the present defendant's title was invalid. The rule was announced that, where the action was essentially one *in personam*, jurisdiction over a nonresident may be obtained only to the extent of his property within this state, attachable and attached. 'The substituted service of process by publication, allowed by the law of Oregon and by similar laws in other states where actions are brought against nonresidents, is effectual only where, in connection with process against the person for commencing the action, property in the state is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property, or affecting some interest therein; in other

words, where the action is in the nature of a proceeding *in rem.'*

The death of Hugo R. Meyer did not have the effect of changing the purely personal obligation into a direct claim against his particular assets in New York state. It was a claim against his executor or administrator in his representative capacity. Attachment or seizure of the property was unnecessary, and after judgment the property of the estate could be traced. See *Albert* v. *Bascom* (D. C.), 245 F. 149.

Both appellant and appellee reside outside of the Southern District of New York—outside the state. Under Section 51 of the Judicial Code (U. S. Code, title 28, Sec. 112 (28 U. S. C. A., Sec. 112), they have personal immunity from suit in any district other than the one where either of the parties reside. *Gen. Investment Co.* v. *Lake Shore Ry.*, 260 U. S. 261, 43 S. Ct. 106, 67 L. ed. 244; *Camp* v. *Gress*, 250 U. S. 308, 39 S. Ct. 478, 63 L. Ed. 997; *U. S. Fidelity & Guaranty Co.* v. *Jaeger Mfg. Co.* (C.C.A.), 1 F. (2d) 975, 977; *Haviland* v. *Atlantic Coast Line R. Co.* (D. C.), 299 F. 955. The place of the parties' personal residence controls, as distinguished from the official residence. *Amory* v. *Amory*, 91 U. S. 356, 23 L. Ed. 436; *McDuffie* v. *Montgomery* (C. C.), 128 F. 105.

(7, 8) It is argued that the appellee waived his right to ask for a dismissal below because he not only asserted his privilege of a personal suit in the District Court but urged that the court lacked jurisdiction of the subject-matter, and, further, that he failed to move to set aside the order of service of the subpoena in Oklahoma. There was no general appearance, nor was a demurrer filed, presenting arguments addressed to the jurisdiction of the court and on the merits of the case, as in *St. Louis & S.*

F. R. R. Co. v. *McBride,* 141 U. S. 127, 11 S. Ct. 982, 35 L. Ed. 659, and *Western Loan & Sav. Co.* v. *Butte & Boston Mining Co.,* 210 U. S. 368, 23 S. Ct. 720, 52 L. ed. 1101. Appellee limited his appearance to the motion to dismiss. He sought to raise no question as to the merits. *Armstrong* v. *Langmuir* (C.C.A.), 6 F. (2d) 369; *Kelley* v. *T. L. Smith Co.* (C.C.A.), 196 F. 466. Nor is there force in the claim of waiver for failure to move to set aside the service of the subpoena. This relief was obtainable by a special appearance and motion to dismiss the bill without asking to vacate the service of process. *Camp* v. *Gress,* 250 U. S. 308, 39 S. Ct. 478, 63 L. Ed. 997; *Ladew* v. *Tenn. Cooper Co.,* 218 U. S. 357, 31 S. Ct. 81, 54 L. Ed. 1069. The court properly dismissed the bill as against this appellee.

(9) The twenty-sixth paragraph of the complaint alleges that the Bankers' Trust Company paid to the appellee, E. H. Rollins & Sons, sums of money which were the property of Philip A. Meyer, and at the time of the death of Hugo R. Meyer, E. H. Rollins & Sons had on hand or shortly thereafter received these moneys, and that they still hold the property within the Southern District of New York and title thereto is claimed by the appellant. The appellant contends that the bill should not be dismissed as against the appellees, E. H. Rollins & Sons. He alleges that these appellees have $4,840.28, the property of the incompetent, Philip A. Meyer, against which sum claim is made by the estate of Hugo R. Meyer, and that these appellees have declined to comply with either of the demands and hold this sum of money within the Southern District of New York. Appellees E. H. Rollins & Sons have filed an answer, admitting possession of the money and asserting that the plaintiff and defend-

ant both claim it. The decree entered dismisses the bill, for the reason the appellee Beard is a necessary and indispensable party defendant, and was not and is not an inhabitant residing in the district, and did not consent to be sued. It was error to dismiss the bill as against E. H. Rollins & Sons. If the property held is that of Philip A. Meyer, relief may be had by appellant against it. We will reverse the decree as to E. H. Rollins & Sons, and remand the suit to the District Court, to determine what relief should be granted in equity after a trial. It may become necessary to transfer the cause to the law side of the court. The decree, so far as it dismisses the bill against the appellee Beard, is affirmed.

Decree modified."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 349.

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM AND JOE R. SOUTHARD, JR., PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, A CORPORATION, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, ET AL., RESPONDENTS.

REPLY BRIEF OF PETITIONERS.

GLENN O. YOUNG,
Sapulpa, Oklahoma,
Attorney for Petitioners.

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INDEX

Subject Index.

Discussion of Points Made by Respondents..... 1

Respondents Do not Consider Second Judgment of County Court. 2-5

Discussion of Respondents' Statements and Contentions as to the Following Propositions:

I. Jurisdiction of the County Courts of Oklahoma in probate matters is exclusive original jurisdiction. 5

II. That jurisdiction was duly invoked and exercised prior to the institution of the instant proceeding as to both the subject matter and the parties. 10

III. The judgment of the County Court refusing to vacate the decree was in conformity to local law. 10

IV. It was the duty of the federal court to sustain the plea of the surety to dismiss the bill of the surety for want of jurisdiction at the trial. 12

(a) Because the action, if any existed, was ex contractu and the court had no jurisdiction of the parties to the bond..... 12

(b) The federal court had no jurisdiction of the asserted cause of action because of the prior judgment and decree of the state court. 12

(c) The U. S. District Court of the Northern District had no venue of the parties..... 12

(d) The suit was not a local action under 28 U.S.C.A., Secs. 116-118. 1

(e) The bill stated no cause of action within either the legal or equitable jurisdiction of the court. 1

V. It was the duty of the court to sustain motion to dismiss both the bill and the cross-petition at the trial for want of jurisdiction. 1

(a) The burden was upon the persons asserting jurisdiction in the federal court for diversity of citizenship to establish diversity, which was not done. 1

(b) There was no complete diversity of citizenship between the real parties in interest as required by 28 U.S.C.A. 111-112. 1

(c) The relief prayed and granted was in personam against non-residents of the Northern District and was beyond the jurisdiction of the court. 1

Conclusion. 1

Table of Cases.

Charlotte Weyant, et al., Respt., vs. Utah S. & T. Co., Appt., 182 P. 189, 9 A. L. R. 1119. 1

Commonwealth Trust Co. vs. Bradford, 297 U. S. 613, 56 S. Ct. 600, 80 L. Ed. 920. 6,

Glades Co., Fla., vs. Detroit Fidelity & Surety Co., 57 F. (2d) 449. 1

Hewitt vs. Hewitt, et al., 17 F. (2d) 716. . . . . .

Marshall vs. Holmes, 141 U. S. 589, 12 S. Ct. 62, 35 L. Ed. 870..... 9
Morley Construction Co. vs. Maryland Casualty Co., 90 F. (2d) 976..... 14

Princess Lida of Thurn and Taxis vs. Thompson, 305 U. S. 456, 59 S. Ct. 275, 83 L. Ed. 285..... 6, 8

Rose vs. Oklahoma City, 182 Okl. 422, 78 P. (2d) 315..... 3

Southwick vs. Jones, 177 Okl. 409, 60 P. (2d) 774..... 12

Walton vs. Williams, 5 Okl. 642, 49 P. 1022..... 15
Waterman vs. Canal-Louisiana Bank & Trust Co., 215 U. S. 33, 30 S. Ct. 10, 54 L. Ed. 80..... 6, 7

Statutes Cited.

A. L. R., Vol. 9, page 1123..... 10
O. S. A., Title 12, Sec. 1108..... 14
O. S. A., Title 58, Sec. 127..... 11
O. S. A., Title 58, Sec. 128..... 11
O. S. A., Title 58, Sec. 130..... 11
O. S. A., Title 58, Sec. 162..... 11

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 349.

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM AND JOE R. SOUTHARD, JR., PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, A CORPORATION, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, ET AL., RESPONDENTS.

DISCUSSION OF POINTS MADE BY RESPONDENTS.

Separate briefs have been filed on behalf of the casualty company and its co-respondents. The matters therein may, however, be conveniently discussed under the captions adopted by the respondent casualty company from the brief of petitioners. The points made by the respondents other than the casualty company, viz.,

1. That the United States District Court had authority to vacate the decree of the County Court because the same was obtained by fraud.

2. That a cross-petitioner or intervener may obtain the same relief as they could if they were original petitioners.

3. That the judgment of the County Court declaring the estate of Legette D. Kelleam to be ancestral is void,

insofar as material to the issues before this court, will be considered under the appropriate and related captions adopted by petitioners and the casualty company.

Preliminarily, however, it is desired to emphasize that the issues before this court involve primarily questions of jurisdiction of the trial court as to (a) the subject matter, (b) the parties, and (c) to grant the particular relief sought by the bill and cross-bill and awarded by the decree.

Insofar as the prior proceedings in the state court are concerned, the issue here is not whether the judgments of that court were correct or incorrect, but rather whether that court had jurisdiction to determine and did determine the questions there presented. Fraud, if it existed, could have been the objective of remedial action in the County Court and that court's decision as effectively precluded the parties both as to the facts and the law as could the subsequent judgment of the federal court.

RESPONDENTS DO NOT CONSIDER SECOND JUDGMENT OF COUNTY COURT.

Much comment is incorporated in both answer briefs upon the alleged fraud of the petitioners in obtaining the *first* judgment of the probate court. Both briefs are eloquently silent regarding the *second* judgment of the County Court which determined every issue thereafter

submitted to the national court including the issue of fraud and the validity of the first decree of the County Court. Those issues became *res adjudicata* with the entry of the second judgment, and whether right or wrong as to the law the rule of *stare decisis* and of the law of the case precludes a re-examination of the questions thereby determined except upon appeal timely noted and prosecuted with due diligence. The rule is settled by the local law and practice. *Rose* v. *Oklahoma City,* 182 Okl. 422, 78 Pac. (2) 315.

The nearest approach to a consideration of the force and effect of the *second* judgment of the probate court, and the effect of the pendency of an appeal in the state tribunals from that judgment appears at page 17 of the surety's brief where it is suggested, argumentatively, that the surety appeared specially in the County Court in an effort to quash process of some sort. This is clearly without the record but also met squarely by the observation that if in proceedings against it in the County Court, process was not sufficient to invest jurisdiction in the court to render in any event judgment binding the surety, this circumstance constitutes an additional ground upon which it could claim immunity from any subsequent liability. For if this be true, it was exonerated not only by the two favorable judgments for its principal, but also by the further circumstance that process obtained was insufficient to render it subject to the mandate of the court even in event of a reversal of the judgment as to the principal upon appeal. The contention emphasizes the insubstantial nature of its claim to "exoneration" in the federal court; for from it the surety had been at the date of the decree complained of exonerated not twice but three times viz., (1) by the original judgment of the County

Court expressly exonerating both principal and surety, (2) by the judgment holding service against the surety inadequate to confer upon the County Court jurisdiction to assess liability against it in the second proceeding, even though its principal might be bound, and (3) by the second judgment of the County Court exonerating the principal which of necessity also discharged the surety. The surety could not even be harmed by a reversal as to the principal on appeal if it had not been served properly and had made a special appearance to challenge jurisdiction which was proper.

All of which but further emphasizes the curious reluctance of the surety to be exonerated, and lends support to the petitioners' contention, otherwise well supported by the record that the institution of this litigation in the federal court, and the summary appointment of a receiver to take charge of the estate without notice to the respondents to whom it had been judicially determined it belonged was in furtherance of a collusive arrangement between agents of the surety and its co-respondents to take the cause in the federal court and thereby circumvent the jurisdiction and authority of the state tribunals in the case then pending upon appeal; and in the hope that there a different view of local law might be applied.

At page 3 the respondents, other than the casualty company, also go without the record to recite that an order was made staying all proceedings in the state court pending outcome of this action, and then counsel volunteer to furnish a certified copy of this order of the appellate court if desired at the time of argument. It is not clear how observance of an amenity of this character by the state tribunal to await determination of this controversy finally in the national courts before proceeding further

can enlarge or diminish the initial jurisdiction of the District Court for the Northern District, which jurisdiction either existed or was absent regardless of any subsequent order or proceedings in the state court. Why emphasis is placed on this occurrence if it be true is not at all clear.

Frequent repetition in both answer briefs of the terms "fraud" and "fraudulent" to buttress argument and authorities involving jurisdiction of the national courts provokes the observation that the issue here is not whether the judgment of the state court was obtained by fraud, but whether the federal court in the proceeding by the casualty company and upon the cross-petition of the cross-petitioners had jurisdiction initially and if so exceeded its power by the decree. In fairness to the petitioners here, however, it should be noted that, perhaps fortunately, no court has ever held that contrary contentions regarding either facts or law by opposing litigants constitute fraud; and if any court should so hold application to that rule to the parties at bar here would unquestionably produce embarrassing results for either one of them or the other.

I. Jurisdiction of the County Courts of Oklahoma in probate matters is exclusive original jurisdiction.

Respondents make no objection to this proposition and do not quarrel with any of the authorities cited by petitioners to sustain it. The effort made is to escape application of the principle to the facts. The surety asserts at page 15 that:

> "* * * this kind of a proceeding does not disturb the possession of the property by the said court."

It cites *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 44, 30 S. Ct. 10, 54 L. ed. 80; *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613, 619, 56 S. Ct. 600, 80 L. ed. 920; *Princess Lida of Thurn and Taxis* v. *Thompson*, 305 U. S. 456, 59 S. Ct. 275, 281, 83 L. ed. 285. Examination of those cases will show (1) that none of them relate to the constitutional and statutory authority of the County Court of Oklahoma in probate matters and (2) that only the first case involves a probate proceeding. That case, *Waterman* v. *Canal-Louisiana Bank & Trust Co., supra*, did not arise under facts even approximately similar to those here for therein Frances E. Waterman, a resident of Chicago, Illinois, joined by her husband, also a citizen of Illinois, brought suit in the United States Circuit Court against the Canal-Louisiana Bank & Trust Company executor of the last will and testament of Caroline Stannard Tilton, a citizen of the State of Louisiana and an inhabitant of the Eastern District of that state and others to recover a legacy. The court expressly recognizes that a proper diversity of citizenship is indispensable to federal jurisdiction. The case expressly determines that:

> "The courts of the United States, while they may exercise the jurisdiction, and may make decrees binding upon the parties, cannot seize and control the property which is in the possession of the state court."

citing *Byers* v. *McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 S. Ct. 906. In the case at bar jurisdiction of the federal court is bottomed upon a contention of respondents that suit is *in rem*, of a local nature, and that the federal court acquired jurisdiction by appointment of a receiver for the property.

The *Waterman* case says further, referring to *Farrell* v. *O'Brien,* 199 U. S. 89, 50 L. ed. 101, 25 S. Ct. 727:

> "That case recognized what previous cases had held—that, in proceedings purely of a probate character, there was no jurisdiction in the federal courts. This was in harmony with the rule theretofore laid down in *Byers* v. *McCauley, supra,* in which it was held that the federal court could not exercise original jurisdiction to draw to itself the entire settlement of the estate of the decedent and the accounts of administration, or the power to determine all claims against the estate. But it was there decided that a circuit court of the United States could entertain jurisdiction in favor of citizens of other states, to determine and award by decrees binding *in personam* their shares in the estates."

From the quoted portions, it is obvious decrees by federal courts in proceedings of the nature under consideration are considered *in personam,* which is precisely the contention of petitioners and of necessity emphasizes want of jurisdiction herein, for if the case be *in personam,* personal service upon respondents in the district or their voluntary appearance was indispensable as authorities heretofore cited clearly establish.

Commonwealth Trust Company v. *Bradford, supra,* upon which the surety relies, was a controversy between a trustee appointed by a state court and the receiver of a bank for an adjudication of the bank's interest in certain assets. This court say:

> "The trust here involved was created by the bank's voluntary action, not by the Orphans' Court. Whatever control the latter possessed resulted solely from appointment of the successor trustee and, for present purposes, did not materially differ from that exercised by probate courts over such fiduciaries as

> guardians, administrators, executors, etc. * * * Such proceedings are not *in rem;* they seek only to establish rights; judgments therein do not deal with the property and order distribution; they adjudicate questions which precede distribution. * * * only a judgment *in personam* was rendered."

Here again this court recognized proceedings of the character here to be *in personam* and not local.

The next case relied upon by respondents, *Princess Lida of Thurn and Taxis* v. *Andrew A. Thompson, et al.,* trustees, recites that (Headnote 3):

> "Where the judgment sought in a suit in a state court and in a suit brought in a federal court on the same cause of action is strictly *in personam,* both courts, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other."

And, Headnote 4:

> "If a suit instituted in a state court and a suit brought in a federal court on the same cause of action are *in rem* or *quasi in rem,* so that the court or its officer has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought, the jurisdiction of the court in which suit was first instituted is exclusive."

And further, Headnote 5:

> "The principle that the state or federal court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer

trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property."

The latter decision is by Mr. Justice Roberts. It was determined that:

"The common pleas court could not effectively exercise the jurisdiction vested in it, without a substantial measure of control of the trust funds. Its proceedings are, as the court below held, *quasi in rem*, and the jurisdiction acquired upon the filing of the trustees' account is exclusive. The District Court for the Western District of Pennsylvania is without jurisdiction of the suit subsequently brought for the same relief, and the petitioners were properly enjoined from further proceeding in that court."

Hewitt v. *Hewitt, et al.*, 17 F. (2d) 716, is also cited and relied upon under this caption. That case recognizes that the right of a federal court of equity to give relief against a judgment of the state court obtained by fraud is limited to cases *where diversity of citizenship exists.* The case did not involve a situation where the state court rendering a decree, in a direct attack upon the decree in that court, had expressly adjudicated the identical matter subsequently presented for determination by the federal court. *Marshall* v. *Holmes*, 141 U. S. 589, 12 S. Ct. 62, 35 L. ed. 870, which is also cited, merely announces the unquestioned rule that federal circuit courts of equity have jurisdiction to restrain for fraud the execution of judgments obtained in the state court where diversity of citizenship gives jurisdiction over the parties. This is but the exercise of an equity power likewise possessed by the state courts of chancery. But here the effort was not to restrain (which would be clearly a personal action and not maintainable against defendants where not served), but for other purposes, and there was no diversity of citizenship between the real parties in interest.

II. That jurisdiction was duly invoked and exercised prior to the institution of the instant proceeding as to both the subject matter and the parties.

The effort to show a limited appearance in the County Court by the surety mentioned under this head has previously been discussed (*supra*, p. 3 *ff.*).

Counsel also quote extensively from the Oklahoma statutes governing probate procedure, Title 58, O. S. A., Sections 127, 128, 130 and 162, under this head. The discussion is obviously in reply to a contention of petitioners under the succeeding caption rather than under this head, and will be discussed under the appropriate head (Par. III *ff.*).

Petitioners' contention that decrees of the County Court bind alike the surety and the administrator so that its judgment constituted as effective an exoneration as could be had elsewhere appears not denied. Upon the issue of collateral and direct attacks the surety respondent, ignoring the Oklahoma cases cited by petitioners, cites *Charlotte Weyant, et al., Respt.* v. *Utah S. & T. Co., Appt.*, 182 P. 189; 9 A. L. R. 1119 and 9 A. L. R., page 1123. The questions are amply covered by local law and decisions of the Oklahoma Supreme Court and the rule elsewhere if it varies, which is not conceded, is of no moment and in the interest of brevity will therefore not be analyzed.

III. The judgment of the County Court refusing to vacate the decree was in conformity to local law.

Counsel concede that so far as the mechanics and procedure followed in the probate court were concerned, the local law was followed; also that E. A. Kelleam was entitled to appointment as administrator, and that he had

a preferential right to appointment. Previously in their brief, at page 17, extensive citations from Title 58, O. S. A. are inserted, as noted above, the quotations being from Sections 127, 128, 130 and 162 of the code governing administration of estates, and the observation is made that from the above cited statutes *it is a fixed policy of the law that before administrators shall be appointed notice must be mailed personally to all heirs at law.* Wholly deleted from the quotation of Section 128, entitled "Notice of Hearing," is the following material proviso:

> "Provided, that if the petition asks for the appointment of some person entitled under the law to appointment, and there shall accompany such petition a waiver of all persons having a prior right to appointment, then no notice shall be given, and the court shall proceed without delay to hear such petition."

It was under this omitted proviso that E. A. Kelleam as the only surviving brother was entitled to appointment *forthwith and without notice* as determined in the cases cited by petitioners under this head in their brief.

The remaining discussion under point 3 by the respondents attempts to explain away the undisputed evidence before the trial court that:

> "My sister heard that the estate had been administered and told me. That was two years ago last October."

Concerning this statement counsel say:

> "This can serve only one purpose in the world and that is to show that one of these heirs knew of the existence of the probate proceedings in time to have come into the county court."

The testimony not only shows that one but that at least two of the respondents knew of the probate proceedings in time to have asserted their rights by timely appearance or by appeal. The statement is nowhere denied; neither is there anywhere in the testimony evidence that all the petitioners had not like information, by reason of which they were precluded by laches and delay from an attack on the judgment under the plain provisions of the state law.

The respondents, other than the surety, say that "*no complaint is made * * * of the appointment of E. A. Kelleam as administrator;*" but they do complain that he was a non-resident at the time of his appointment and did not appoint a service agent. How this, if true, could have in any way affected their rights is not clear. The appointment of a service agent is merely directory and not jurisdictional. *Southwick* v. *Jones,* 177 Okl. 409, 60 P. (2d) 774. Moreover the record does not support the statement that at the time he was appointed administrator the respondent E. A. Kelleam was not then a resident of Drumright, Creek County, Oklahoma.

IV. It was the duty of the federal court to sustain the plea of the surety to dismiss the bill of the surety for want of jurisdiction at the trial.

(a) Because the action, if any existed, was *ex contractu* and the court had no jurisdiction of the parties to the bond.

(b) The federal court had no jurisdiction of the asserted cause of action because of the prior judgment and decree of the state court.

(c) The U. S. District Court of the Northern District had no venue of the parties.

(d) The suit was not a local action under 28 U. S. C. A., Secs. 116-118.

(e) The bill stated no cause of action within either the legal or equitable jurisdiction of the court.

Counsel assert that they will answer all of the issues raised by sub-paragraphs a, b, c, and d (*supra*) under one head, but an analysis of their reply brief will show propositions a, b, and c nowhere discussed or considered. Neither are these propositions answered by the surety's co-respondents. The surety argues that Sections 116 to 118, Title 28, U. S. C. A., are controlling, but depends upon the decision of the Circuit Court herein complained of alone for support and the entire matter is dismissed with the observation:

> "Our law suit must stand or fall on this proposition. That is—that this was an action to impress a trust upon real and personal property located and having a fixed situs in the northern and western districts of Oklahoma."

Previously in their brief at page 12 the surety company assure the court:

> "This is an action brought by the surety on the administrator's bond in the nature of a suit in exoneration and to impress a lien upon the property involved."

The surety's co-respondents assert (their br. p. 4) that the case grows out of the surety's

> "* * * own peculiar rights as surety to seek protection of the Federal District Court and the case further gives the right to the cross-petitioners, who were made defendants by the plaintiff, Maryland Casualty Company, to have their rights adjudicated

in and to any funds or property over which the court acquired jurisdiction by reason of the original action."

In view of these somewhat abstruse statements and the equally conflicting statements regarding the nature of the action by the Circuit Court, the difficulty of classifying this somewhat unusual type of case becomes more readily apparent. Elsewhere the action is referred to by inference as a bill *quia timet* by the surety and the following cases from other jurisdictions supporting the right to maintain such an action are cited: *Morley Construction Co., et al.* v. *Maryland Casualty Company,* 90 F. (2d) 976, and *Glade County, Fla.* v. *Detroit Fidelity & Surety Co.,* 57 F. (2d) 449.

Although no mention is made of petitioners' contention that:

> *"The bill stated no cause of action within either the legal or equitable jurisdiction of the court,"*

(sub-para. E, *supra*), counsel for the surety make reference to the provisions of 12 O. S. A. 1108 (R. L. 1910, Sec. 5308) discussed under this head by petitioners. They omit wholly any discussion or consideration of the qualifying provisions of the section expressly limiting the right of the surety to file suit before the liability is due (in the nature of a bill *quia timet*) to situations as:

> *"Whenever any of the grounds exist, upon which, by the provisions of this code, an order may be made for arrest and bail or for an attachment."*

These restrictive provisions are as much part of the statute as those preceding, and they clearly preclude maintenance of a suit of this character under the circum-

stances admittedly existing by the surety *in either a state or federal court,* as clearly shown in petitioners' original brief (pp. 49 *ff.*). Since the matter is governed by the express provisions of the statutes in Oklahoma no purpose can be served by consideration of the cases from other jurisdictions and under other circumstances which counsel cite at page 28. *Walton* v. *Williams,* 5 Okl. 642, 49 P. 1022, the only Oklahoma case cited involved a suit on a brewery employee's bond and not any set of facts such as are now before the court. The case specifically recites that:

> "* * * the petition set forth facts which would authorize an order of attachment" (l. c. 646).

And an attachment was issued (l. c. 645). In it the prayer was that the defendants be ordered and adjudged to indemnify the plaintiffs—clearly an action for relief *in personam,* and that, if defendants failed to indemnify as ordered, plaintiffs be awarded judgment for the amount of their liability as sureties. The case therefore does not, as asserted, establish that a surety has an equitable lien upon the property of his principal, nor that an action for indemnity is a local action, nor that a surety has an action for indemnity before the debt has been paid under all circumstances where he may fear a loss.

The danger of sanctioning the rule contended for will be appreciated if it be remembered as heretofore noted that under it a surety, having undertaken for hire to assume a risk, could at will take over the property of his principal and supplant the administrator and the court through intervention of a chancery court. This would defeat the very object and purpose of the surety bond in the first instance, and impede the functioning of the probate tribunal.

V. It was the duty of the court to sustain motion to dismiss both the bill and the cross-petition at the trial for want of jurisdiction.

(a) The burden was upon the persons asserting jurisdiction in the federal court for diversity of citizenship to establish diversity, which was not done.

(b) There was no complete diversity of citizenship between the real parties in interest as required by 28 U. S. C. A. 111-112.

(c) The relief prayed and granted was *in personam* against non-residents of the Northern District and was beyond the jurisdiction of the court.

Under this head, without considering any of the specific propositions advanced by petitioners separately, the surety argues that the interest of the cross-petitioners was adverse to the interest of the Maryland Casualty Company, and that there was no common interest between them, therefore, that there was no occasion for a realignment of the parties. It is petitioners' view that in any suit involving liability of the administrator upon his bond, the administrator and the surety must of necessity be aligned against the cross-petitioners; that in such suit the administrator as such is an indispensable party; that the real controversy was between contending claimants to an interest in the estate and that the court's jurisdiction to grant relief upon the cross-petition was limited to controversies between claimants where a diversity of citizenship existed and the parties were within the court's jurisdiction. Particularly is this true when it is noted that the real hub of the conflict among all of the parties revolves about two judgments of the County Court, to which all were parties. This judgment could not be set aside as to part without affecting the interests of all. All were indispensable parties to an action involving its validity.

No reference is made in the briefs to the failure to prove citizenship or residence of Kelleam Hall nor to the uncertainty and conflict between allegations of "residence" and "citizenship" and "address" in the petition, the evidence, and the decree, all of which are in hopeless confusion. It is suggested that in the County Court E. A. Kelleam when appointed administrator stated that his address was Drumright, Oklahoma. Of course reference is to his address at the time he was appointed administrator in 1936, not to his citizenship or residence some years later, when the plaintiff in this action filed suit asserting him then to be a resident and citizen of Arizona, which was not then denied.

The surety further argues that it is a well settled rule of law that proof of residence is *prima facie* evidence of citizenship where no issue upon that fact is made. Of course in the case at bar there was a very definite issue upon this matter and, as the cases heretofore cited clearly show, the burden of proof was upon the person asserting federal jurisdiction which burden was not discharged.

A moment's reflection will reveal the dangers from a relaxation of the established rule that federal jurisdiction where dependent on the divergent citizenship of litigants must be tested strictly by *citizenship*, and not by such loose expressions as where the litigant "lives," "resides" or has his "address." For obviously wherever a citizen is he lives; residence may be temporary, and most any desired place can at will or caprice become one's "address." And if the *citizenship* test is not observed with some rigidity, the federal tribunals will be swamped with litigation contrary to the intent and purpose of the basic law and the public policy therein expressed.

At page 29 of its brief, the surety company asserts that no personal judgment was rendered or attempted to be rendered below. Petitioners do not so construe the decree. Reference to its terms will show that in the face of affirmative and undisputed evidence showing all matters at issue had been previously adjudicated by the County Court, and that the cause was then pending on appeal in the state courts, the federal court attempted to redetermine every question both of fact and of law previously decided in the County Court. Regarding its provisions, the decree speaks.

Conclusion.

This case presents clearly a situation where, following a decision by a state court of competent jurisdiction and while the cause is pending on appeal in the state court, litigants finding the going rough and conceiving that they would perhaps fare better in the federal courts, collusively institute suit there and attempt to circumvent established limitations upon the jurisdiction of the national courts and to impede and thwart the orderly progress of the case through the established and customary channels. It evidences such a wide divergence from the usual judicial procedure, such evident disregard of the limitations upon the jurisdiction of the federal courts and such definite and unwarranted imposition upon the prior authority of state courts of at least co-ordinate and concurrent jurisdiction and disregard of their mandates, as to warrant intervention of this court to avoid unseemly conflict and confusion.

It is therefore respectfully submitted that the decree complained of should be reversed and the petitioners restored to all rights denied them by virtue of this proceeding, including costs necessarily incurred as the result of it.

GLENN O. YOUNG,
Sapulpa, Oklahoma,
Attorney for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 349

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM AND JOE R. SOUTHARD, JR., *Petitioners*,

vs.

MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, a corporation, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, J. K. PERKINS, MRS. F. BATES, GLEN PERKINS, BESSIE MATHEWS, MRS. ELOUISE KULP, LEGGETTE HALL, LAMAR HALL, MARGUERITE BRADLEY KELLEAM, MARY KATE HALL, KELLEAM HALL, CLIFFORD KELLEAM, KATHLEEN KELLEAM, DR. FANNIN KELLEAM, FRANCIS KELLEAM, MRS. JIMMIE KELLEAM, AND ROBERT KELLEAM, *Respondents*.

RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

Subject Index

BRIEF IN RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI

		Page
1-A	United States District Court had the authority to vacate the decree of the County Court because the same was obtained by fraud and void on its face	7
1-B	The judgment of the County Court declaring the estate of Leggette D. Kelleam to be ancestral is absolutely void	8
1-C	The relief sought and granted by the cross-petition was in conformity with the general rule as laid down by Federal Courts	9
2-A	The action was not an attempt by the Federal Court to assume jurisdiction over the matters of the County Court, nor was it an attempt to review, upon appeal, the decision of the County Court	9
2-B	The fact that the County Court's jurisdiction to vacate for fraud had been invoked by the cross-petitioners herein will not defeat the Federal Court's right to adjudicate this matter	10
2-C	The facts determined by the trial court and upheld by the Circuit Court of Appeals will not be looked into upon appeal	10
3	The action was local	11
4	There was a diversity of citizenship between the real parties in interest	12
5	Conclusion	13

INDEX

Table of Cases

	Page
Adams v. Anderson, 53 N. Y. S. 141	8
Baker v. Schofield, 37 S. CT. 333, 243 U. S. 114, 61, LED. 626	11
Beatty v. Beatty, 114 Okla. 5, 242 Pac. 766	7
Caulk v. Lowe, 74 Okla. 191, 178 Pac. 101	7
Central Surety Corporation, et al., v. Bagley, (9 Cir.), 44 Fed. (2d) 808	9
Condit v. Condit, 66 Okla. 215, 168 P. 456	9
Eason v. Highley, 28 S. W. (2d) 1048	8
Forgy v. Lamphear, 114 Okla. 245, 289 Pac. 294	7
Green's Estate, 80 Okla. 256, 196 Pac. 128	8
Henderson v. Sherman, 47 Mich. 267; 11 N. W. 153	8
Hewitt v. Hewitt, 17 Fed. (2d) 716	7
Insurance Company v. Harris, 97 U. S. 331, 336, 24 LED. 959	10
Jefferson v. Gallager, 56 Okla. 405, 150 P. 1071	9
Kelly v. McGuire, 15 Ark. 555	8
Lau Ow Bew, 141 U. S. 583	13
Long's Estate, 180 Okla. 28, 67 P. (2d) 41, 110 A. L. R. 1002	8
McDougal v. Black Panther Oil & Gas Company, Okla. 1921, (10 Cir.) 273, Fed. 113	10
Magnum Import Co. v. Coty, 262 U. S. 159	13
Marshall v. Holmes, 141 U. S. 589 (9 Cir.) 12 S. CT. 35 LED. 870	7
Republic National Bank & Trust Company v. Massachusetts Bonding & Insurance Company (5 Cir.), 68 Fed. (2d) 445	9-12

Sim's Estate, 162 Okla. 35, 18 P. (2d) 1077 8

Stuart v. Hayden, 169 U. S. 1, 14, 42 LED. 639, 18 S. CT. Rep. 274 11

Thompson v. Smith, 102 Okla. 150, 227 Pac. 77, 29 L. R. A. 541 8

Walton, et al v. Williams, 5 Okla. 642, 49 Pac. 1022 11

Wheeler v. Bigheart, 172 Okla. 262, 43 P. (2d) 1028 7

Woods, 143, U. S. 202 13

Yahala's Estate, 142 Okla. 79, 285 Pac. 946; 80 O. S. A. 222; 18 C. J. 819, Sec. 21 8

Zweigel v. Lewis, 139 Okla. 171, 281 Pac. 787 8

STATUTES

28 USCA, Sections 116 to 118 11

Oklahoma Statutes Annotated, Title 12, Section 1108 11

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In the
Supreme Court of the United States

No.....

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM AND JOE R. SOUTHARD, JR., *Petitioners,*

vs.

MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, a corporation, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, J. K. PERKINS, MRS. F. BATES, GLEN PERKINS, BESSIE MATHEWS, MRS. ELOUISE KULP, LEGGETTE HALL, LAMAR HALL, MARGUERITE BRADLEY KELLEAM, MARY KATE HALL, KELLEAM HALL, CLIFFORD KELLEAM, KATHLEEN KELLEAM, DR. FANNIN KELLEAM, FRANCIS KELLEAM, MRS. JIMMIE KELLEAM, AND ROBERT KELLEAM, *Respondents.*

RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

This response is filed in behalf of Mrs. Ethel Riddler, Mrs. Dorothy Payne, J. K. Perkins, Mrs. F. Bates, Glen Perkins, Bessie Mathews, Mrs. Elouise Kulp, Leggette Hall, Lamar Hall, Marguerite Bradley Kelleam, Mary Kate Hall, Kelleam Hall, Clifford Kelleam; Kathleen Kelleam, Dr. Fannin Kelleam, Francis Kelleam, Mrs. Jimmie Kelleam and Robert Kelleam, who were defendants and cross-petitioners in the lower court. For convenience these parties will be referred to as cross-petitioners in this response.

The cross-petitioners adopt the statement of facts contained in the response of the Maryland Casualty Company and the facts as set out by the Circuit Court of Appeals in their opinion filed herein (R. 149-152). As a matter of brevity the questions presented in this brief will deal with the rights of the cross-petitioners to obtain the relief sought and granted by the trial court and affirmed by the Circuit Court of Appeals. This brief will answer the specifications of error set out in the appellant's brief and not the generalizations indulged in by the appellants.

PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

The opinion of the Circuit Court of Appeals appears at pages 149 to 159 of record in this case and is reported in 112 Federal (2d), page 940. The petitioners rely on Rule 38, Section 5 (b), to have this court grant a writ of certiorari, which reads as follows:

> "5. (b) Where a Circuit Court of Appeals rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter or has decided an important question of local law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Measured by this rule the petition should, therefore, be denied because:

1. The decision rendered by the Circuit Court of Appeals in this case is not in conflict with the decisions of another Circuit Court of Appeals on the same subject.

2. The decision of the Circuit Court of Appeals in

this case is not in any way in conflict with the applicable decisions of the State of Oklahoma.

3. The decision of the Circuit Court of Appeals is in accord with the applicable general law.

4. The decision of the Circuit Court of Appeals does not involve a question of federal law which has not been decided by this court.

5. The decision of the Circuit Court of Appeals does not decide a federal question in conflict with the applicable decisions of this court.

6. The decision of the Circuit Court of Appeals does not depart in any manner from the accepted and usual course of judicial procedure.

7. The case does not involve a question of general, public or national importance.

1.

A. THE UNITED STATES DISTRICT COURT HAD THE AUTHORITY TO VACATE THE DECREE OF THE COUNTY COURT BECAUSE THE SAME WAS OBTAINED BY FRAUD AND VOID ON ITS FACE.

Wheeler v. Bigheart, 172 Okla. 262, 43 P. (2d) 1028;

Caulk v. Lowe, 74 Okla. 191, 178 Pac. 101;

Forgy v. Lamphear, 144 Okla. 245, 289 Pac. 294;

Beatty v. Beatty, 114 Okla. 5, 242 Pac. 766;

Hewitt v. Hewitt, 17 Fed. (2d) 716;

Marshall v. Holmes, 141 U. S. 589 (9 Cir.) 12 S. CT. 35 LED. 870.

The above cases hold a decree of the County Court may be attacked collaterally for fraud. The case of *Hewitt v. Hewitt,* Supra, the Federal Court granted the identical relief sought.

B. THE JUDGMENT OF THE COUNTY COURT DECLARING THE ESTATE OF LEGGETTE D. KELLEAM TO BE ANCESTRAL IS ABSOLUTELY VOID.

A void judgment may be attacked in any judicial proceeding. The record discloses that none of the property constituting the estate of the deceased Leggette D. Kelleam was in fact ancestral. The property left by the mother of Leggette D. Kelleam, being 7 lots in Blanchard, Oklahoma, none of which constituted a part of the estate of the deceased. The inventory (R. 132-141) of the deceased Leggette D. Kelleam shows that none of these lots were listed as assets of his estate and consequently none of the estate of Leggette D. Kelleam was ancestral and the half brothers and sisters and their heirs would share equally with the full brothers and sisters in the proceeds of the estate of Leggette D. Kelleam.

In re Long's Estate, 180 Okla. 28, 67 P. (2d) 41, 110 A. L. R. 1002;

Zweigel v. Lewis, 139 Okla. 171, 281 Pac. 787;

Thompson v. Smith, 102 Okla. 150, 227 Pac. 77, 29 L. R. A. 541;

In re Yahala's Estate, 142 Okla. 79, 285 Pac. 946;

80 *O. S. A.* 222;

18 *C. J.* 819, Sec. 21;

Eason v. Highley, 28 S. W. (2d) 1048;

Kelly v. McGuire, 15 Ark. 555;

Henderson v. Sherman, 47 Mich. 267, 11 N. W. 153;

Adams v. Anderson, 53 N. Y. S. 141.

The decree of distribution and determination of heirship by the County Judge of Creek County being in plain contravention of the statutes of the State of Oklahoma is therefore void.

In re Sims' Estate, 162 Okla. 35, 18 P. (2d) 1077;

In re Green's Estate, 80 Okla. 256, 196 Pac. 128.

It was found by the trial court that the purported distribution of the estate was both fraudulent and void (R. 83). A void distribution and a subsequent exoneration of the surety under a void decree of distribution confers no rights upon anyone and the surety remains unexonerated.

Condit v. Condit, 66 Okla. 215, 168 P. 456;

Jefferson v. Gallager, 56 Okla. 405, 150 P. 1071.

C. THE RELIEF SOUGHT AND GRANTED BY THE CROSS-PETITIONERS WAS IN CONFORMITY WITH THE GENERAL RULE AS LAID DOWN BY FEDERAL COURTS.

Republic National Bank & Trust Company v. Massachusetts Bonding & Insurance Company, (5 Cir.), 68 Fed. (2d) 445;

Central Surety Corporation et al. v. Bagley, (9 Cir.), 44 Fed. (2d) 808.

In these cases the relief sought and granted to the defendants who became cross-petitioners and intervenors corresponds identically with the case at bar.

2.

A. THIS ACTION WAS NOT AN ATTEMPT BY THE FEDERAL COURT TO ASSUME JURISDICTION OVER THE MATTERS OF THE COUNTY COURT NOR WAS IT AN ATTEMPT TO REVIEW UPON APPEAL THE DECISION OF THE COUNTY COURT.

This was an original action brought by the surety seeking exoneration upon its bond (R. 154). And the cross-petitioners herein were made defendants. The cross-petition was filed by the appellees seeking the relief granted by the District Court and affirmed by the Circuit Court of Appeals. No attempt was ever made to usurp the powers given to the County Court by the Constitution of the State of Oklahoma. Under the decisions cited under 1-A above, both the Federal and State Courts

recognize the rule that a decree of the County Court may be vacated for fraud or if void. It was under these decisions that the cross-petitioners herein sought the relief in the Federal Courts.

B. THE FACT THAT THE COUNTY COURT'S JURISDICTION TO VACATE FOR FRAUD HAD BEEN INVOKED BY THE CROSS-PETITIONERS HEREIN WILL NOT DEFEAT THE FEDERAL COURTS RIGHT TO ADJUDICATE THIS MATTER.

As a general rule in the State and Federal Courts, it is not the first court which takes jurisdiction of a matter that decides a case but rather the first court reaching a ruling upon the merits which becomes res adjudicata.

McDougal v. Black Panther Oil & Gas Company, Okla. 1921, (10 Cir.), 273, Fed. 113;

Insurance Company v. Harris, 97 U. S. 331, 336, 24 LED. 959.

In this case the County Court's decision upon the petition for the re-opening of the estate of Leggette D. Kelleam was not upon its merits, rather the County Court denied its own jurisdiction to vacate its own decree for fraud by sustaining a demurrer, and the case is now pending on appeal in the District Court of Creek County, which court has staid proceedings pending the outcome of the Federal Court case (R. 83). Moreover, the County Court of Creek County does not have jurisdiction to set aside conveyances of real estate or to impress a lien as between the parties in this case.

C. FACTS DETERMINED BY THE TRIAL COURT AND UPHELD BY THE CIRCUIT COURT OF APPEALS WILL NOT BE LOOKED INTO UPON APPEAL.

The petitioners have cited and questioned certain facts found by the trial court and upheld by the Circuit Court of Appeals in this case. The general rule in this matter is that the trial court having made a finding of facts (R. 77-85) the same being upheld by the Circuit

Court of Appeals the petitioners cannot now question these findings.

Baker v. Schofield, 37 S. CT. 333, 243 U. S. 114, 61 LED. 626;

Stuart v. Hayden, 169 U. S. 1, 14, 42 LED. 639, 18 S. CT. Rep. 274.

3.

A. THE ACTION WAS LOCAL UNDER 28 USCA. SECTIONS 116 TO 118.

The property sought to be impressed by a lien is situated both in the Northern District of the State of Oklahoma and the Western District of the State of Oklahoma. This is an action to impress a trust on real and personal property with a fixed situs in the Northern and Western Districts of Oklahoma. Section 116 28 USCA provides that a local action involving property of a fixed character lying partly in one district and partly in another, may be brought in the District Court of either district. Section 118 28 USCA provides for service of summons on absent defendants in suits to enforce liens. It has always been a general rule in the State of Oklahoma that a surety has a lien upon the distributed proceedings of the decedent's estate.

Oklahoma Statutes Annotated, Title 12, Section 1108;

Walton et al. v. Williams, 5 Okla. 642, 49 Pac. 1022.

In the case of *Walton v. Williams,* supra, the court in construing the statute on the right of the sureties said:

"In this case the plaintiffs in both petitions prayed that the defendants be ordered and adjudged to indemnify them, and that, failing so to do, plaintiffs have judgment for the amount of their liability as sureties, and the petitions set forth the grounds which would authorize an order of attachment. This statute was meant to change the common law rule, so

"that a surety should not be compelled to stand by and see the principal, for whose obligations he was bond, fraudulently dispose of his property, and leave his just debts to be paid by those whom he had deluded into becoming his sureties. The court erred in sustaining the demurrer to the petition and in refusing to permit the plaintiffs to file an amended petition."

4.

A. THERE WAS DIVERSITY OF CITIZENSHIP BETWEEN THE REAL PARTIES IN INTEREST.

Maryland Casualty Company, the original petitioner in the District Court, was a citizen of the State of Maryland. Cross-petitioners were citizens of other states and one of the cross-petitioners, who was at that time a defendant, was served as a defendant within the Northern District of the State of Oklahoma. The petitioners herein were residents of various other states. No proof was ever made that any of the petitioners were residents of the State of Maryland. Under the peculiar rights of the surety no realignment of parties could be made.

Republic National Bank & Trust Company v. Massachusetts Bonding and Insurance Company, Supra.

The Court in its opinion stated:

"The basis of the surety's case is an equity of exoneration, an assertion that there are funds of its principal properly applicable to the claims against the bond that ought in equity to be so applied before the surety is called on to pay. We examined and upheld this right of the surety on a construction bond under circumstances much like the present in Glades County v. Detroit Fidelity & Surety Company, 57 Federal (2d) 449. The bill is thus based on the surety's own peculiar rights and seeks its protection as surety. If some of the defendants favor the relief prayed, it occasions no realignment of the parties to the destruction of the surety's right to federal jurisdiction. By the main bill it acquired jurisdiction over the retained

payment and the surety's liability on the bond as a fund for distribution, and could deal fully with those subjects.

"Attack was also made on the jurisdiction to entertain the so-called cross bills against the city and the bank filed by claimants who were citizens of Texas, wherein they sought money judgments against the city and the bank for the amount of their claims. These judgments a federal court could not grant. By the main bill it acquired jurisdiction over the retained payment and the surety's liability on the bond as a fund for distribution, and could deal fully with those subjects. A dependent jurisdiction arose to settle disputes even between citizens of the same state and involving amounts less than $3,000.00 so far as necessary fully to administer that fund. But dependent jurisdiction exists only because and so far as it is necessary to fully exercise the main jurisdiction."

CONCLUSION

In conclusion, it is respectfully submitted that the petition for writ of certiorari in the instant case is merely the attempt of the defeated party in the Circuit Court of Appeals to obtain another hearing in its case. The writ of certiorari is never granted for such purpose.

Magnum Import Co. v. Coty, 262 U. S. 159.

The granting of the writ is sparingly exercised by this court.

Re Lau Ow Bew, 141 U. S. 583;

In re Woods, 143 U. S. 202.

It is not contended that the cross-petitioners herein were not the legal heirs of the Leggette D. Kelleam and entitled to their distributive shares in his estate, nor is it contended that the estate was in fact ancestral. The petitioners, E. A. Kelleam and Nell Southard, admit that they obtained the entire estate, both their own share and the shares of the cross-petitioners herein. The attitude assumed by these two petitioners now is that having ob-

tained the property in the decree of distribution no court should require them to make restitution. The trial court found a legal way to restore to the cross-petitioners their just shares in the estate. The Circuit Court in affirming that opinion said:

> "The only conclusion which can be reached from an examination of the transcript is that E. A. Kelleam was a faithless trustee, that he designedly and intentionally proceeded from the beginning to conceal the status of the estate from the court and the heirs; and that he and his sister conspired together to defraud the remaining heirs of that which was their just due. The conclusion of the trial court is the only one that could be reached."

Substantial justice was done in this case and the request for certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1940.

No. 349.

E. A. KELLEAM, et al, *Petitioners*

v.

MARYLAND CASUALTY COMPANY, et al, *Respondents.*

BRIEF OF MARYLAND CASUALTY COMPANY, RESPONDENT, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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INDEX

	Page
Statement of the Case	1
Argument	11
As to Petitioners' Point I	11
As to Petitioners' Point II	20
As to Petitioners' Point III	21
Conclusion	29

CASES CITED

Beatty v. Beatty, 114 Okla. 105, 242 Pac. 766	13
Byers v. McAuley, 149 U. S. 608, 37 L. Ed. 867	21
Caulk v. Lowe, (Sup. Ct. of Okla.) 74 Okla. 191, 178 Pac. 101	15
Central Surety & Ins. Corporation, et al. v. Bagley, (Dist. Ct. S. D. Calif., Cent. Div.) 44 F. (2d) 208	19
Collins v. Ashland, 112 F. 175	28
Dawkins v. Peoples Bank & Trust Co., 117 Okla. 181, 245 Pac. 594	15
Des Moines Bridge & Iron Works v. Plane et al., 163 Iowa 18, 143 N. W. 866	25
Devanney v. Hanson, et al., 60 W. Va. 3, 53 S. E. 603	28
Forgy v. Lamphear, 144 Okla. 245, 291 Pac. 83	15
Glades County, Fla. v. Detroit Fidelity and Surety Company, (C. C. A. 5th Cir.) 57 F. (2) 449	18, 19, 25
Green's Estate, 80 Okla. 256, 196 Pac. 128	15
Hewitt v. Hewitt, (C. C. A. 9th Cir.) 17 F. (2) 716	22, 25
In re Person's Estate, Wallerstedt, Consul, v. Trank, 146 Minn. 230, 178 N. W. 738	28
Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870	22
Morley Construction Co., et al. v. Maryland Casualty Company, (C. C. A. 8th Cir., 1937) 90 F. (2d) 976	17, 25
Morley Construction Co. v. Maryland Casualty Co., 300 U. S. 185, 81 L. Ed. 593	18

Page

Republic Nat. Bank & Trust Co., et al. v. Massachusetts Bonding & Ins. Co., (C. C. A. 5th Circuit) 68 F. (2) 445 25
Republic Nat. Bank & Trust Co., et al. v. Massachusetts Bonding & Ins. Co., (C. C. A. 5th Cir.) 68 F. (2) 445 27
Sanford v. United States Fidelity & Guaranty Co., (Ga. Sup. Ct. 1902) 116 Ga. 689, 43 S. E. 61 19
Simon v. Southern Ry. Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492 22
Smith v. Jennings, (C. C. A. 5th Cir.) 238 Fed. 48.... 22
Southwestern Surety Ins. Co. v. Wells et al., 217 F. 294 25
Taylor v. Harris' Admr. et al., 164 Ky. 654, 176 S. W. 168 25
Porter et al. v. Cooke et al., 63 F. (2) 637 26
Porter Land and Water Co. v. Baskin, 43 F. 323..... 26
Walton, et al. v. Williams, 5 Okla. 642, 49 Pac. 1022.... 16
Walton v. Williams, 5 Okla. 262, 43 P. (2) 1028..... 25
Wells v. Helms, et al., 105 F. (2d) 402..... 11
Wheeler v. Bigheart, 172 Okla. 262, 43 P. (2) 1077.... 15
Wheeler v. Bigheart, 172 Okla. 262, 43 P. (2) 1028.... 20

IN THE

Supreme Court of the United States

October Term, 1940.

No. 349.

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM, and JOE R. SOUTHARD, JR., *Petitioners,*

v.

MARYLAND CASUALTY COMPANY, of Baltimore, a Corp., MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, J. K. PERKINS, MRS. F. BATES, GLEN PERKINS, BESSIE MATHEWS, MRS. ELOUISE KLUP, LEGGETTE HALL, LAMAR HALL, MARGUERITE BRADLEY KELLEAM, MARY KATE HALL, KELLEAM HALL, CLIFFORD KELLEAM, KATHLEEN KELLEAM, DR. FANNIN KELLEAM, FRANCIS KELLEAM, MRS. JIMMIE KELLEAM and ROBERT KELLEAM, *Respondents.*

BRIEF OF MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

In order more fully to acquaint the court with the facts in the case and correct certain inaccuracies and supply omissions we believe that a more detailed statement of the facts should be made as the brief of petitioner does not with sufficient clarity state the facts.

This is an action by a surety on an administrator's bond for protection from a void distribution of the assets of the estate to the exclusion of certain heirs of the decedent. These omitted heirs sought to set aside the void distribution of the estate and from the facts it appeared quite likely under the laws of the State of Oklahoma that the omitted heirs would succeed in vacating the void order of distribution and would then proceed against the surety on the administrator's bond because certain assets of the estate were or had already been placed in hands other than those of the distributees and therefore the surety, alarmed, sought enforcement of its equitable remedy of exoneration.

Leggette D. Kelleam, a resident of Creek County, Oklahoma, died intestate August the 8th, 1936. (Tr. p. 22 and Tr. p. 77.) His heirs, according to the findings of the trial court, were those whose names appear in the transcript at pages 78 and 79. For the convenience of the Court and in order to have a better understanding of the facts the following is the family tree of Leggette D. Kelleam:

W. L. Kelleam,

Wife, Mary Ayres Kelleam,

Children were:

1. Leggette D. Kelleam, deceased.
2. E. A. Kelleam, Sells, Arizona.
3. Nell Southard, Blanchard, Oklahoma.

W. L. Kelleam (same as W. L. Kelleam, above shown to be Mary Ayres Kelleam's husband).

Wife, ...Kelleam.

Children were:

1. Mary Perkins (nee Kelleam), deceased.

Whose children were:

A. Mrs. Fannie Bates, nee Perkins, Yorbalinda, California.

B. Mrs. Bess K. Mathis (Mathew) (named as Mrs. Bessie Bates in the bill of complaint), Santa Anna, California.
C. J. K. Perkins, Milwaukee, Wisconsin.
D. Mrs. Eloise K. Culp (named as Mrs. Elloise or Elouise Bates in the bill of complaint), Long Beach, California.
E. Glen Perkins, Yorbalinda, California.

2. J. M. Kelleam, deceased,

Whose children were:

A. Mrs. Ethel Riddler, Fort Smith, Arkansas.

B. Mrs. Dorothy Payne, nee Kelleam, Galveston, Texas.

3. W. S. Kelleam, deceased.

Whose children were:

A. Clifford Kelleam or Clifford R. Kelleam, Los Angeles, California.
B. Mrs. Kathleen Leiter, nee Kelleam, Los Angeles, California.

4. Kate Hall, nee Kelleam, deceased.

Whose children were:

A. W. L. (Leggette) Hall, Little Rock, Arkansas.
B. Mrs. H. H. Bradley (Marguerite or Margarite Bradley, nee Hall), Alhambra, California.
C. Lamar Hall, Waldron, Arkansas.
D. Mary Kate Hall, Alhambra, California.
E. Kelleam Hall,..... (alleged in complaint to be a citizen and resident of Arkansas or Oklahoma). (Tr. 6) (Testimony of Ethel Riddler that all of heirs live either in Oklahoma, Arkansas or California.)

5. Mrs. Clyde Bates, nee Kelleam, deceased (Mrs. Klyde Bates whose surviving husband and children (Tr. 39) entered into stipulation of settlement with E. A. Kelleam).

6. Mrs. Fannie Bates, nee Kelleam, Fayetteville, Arkansas.

7. Dr. R. T. Kelleam, deceased,

Whose children were:

A. Dr. Fannin Kelleam (F. Q. Kelleam), Amarillo, Texas.
B. Francis Kelleam, Oklahoma City, Oklahoma.
C. Jimmie Kelleam (shown as Mrs. Jimmie Kelleam in bill of Complaint), Oklahoma City, Oklahoma.
D. Robert Kelleam, Texas.

On August 25, 1936, E. A. Kelleam and Nell Southard nee Kelleam, full brother and sister of the deceased Leggette D. Kelleam, filed a petition in the County Court of Creek County for the appointment of E. A. Kelleam as administrator. (See Tr. p. 22.) In this petition they alleged that they were the sole and only surviving heirs. They omitted giving the names, ages, and residence of other heirs of the deceased as required by the Oklahoma Statute (Okla. St. Ann., Title 58, Sec. 127) (O. S. 1931, Sec. 1142) and gave no notice as required by the statutes. (Okla. St. Ann., Title 58, Sec. 128) (O. S. 1931, Sec. 1143.)

On the same day without notice E. A. Kelleam was appointed administrator and duly qualified as such by filing and executing a bond in the sum of $12,000.00 upon which bond this respondent Maryland Casualty Company is surety. (Tr. p. 25) He filed an inventory. (Tr. p. 32) Assets exceeding $25,000.00 were listed. He filed a final report. (Tr. p. 32) In the final report the administrator E. A. Kelleam charged himself with receiving items after the death of the deceased. (Tr. p. 35) This charge was approximately $6,000.00 in cash.

He filed his petition for determination of heirship and for a decree of distribution again alleging that he and his sister were the sole heirs of E. A. Kelleam, deceased.

All of the remaining half sisters and children of deceased's half brothers and half sisters were completely omitted from this request for distribution.

Evidently prior to the hearing of the final account and distribution Fannie Bates, a half sister, and children of Mrs. Klyde Bates learned of the probate proceedings and

contacted E. A. Kelleam and Nell Southard concerning same.

It is important to learn at this point that under the laws of descent and distribution in Oklahoma heirs of the decedent who were half blood kindred inherited equally with those of the whole blood. (Okla. St. Ann., Title 84, Sec. 221) (O. S. 1931, 1626.)

> "Kindred of the half-blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance."

If the estate of E. A. Kelleam was an ancestral estate, that is, descending to him by descent, devise, or gift of someone other than an ancestor of the half blood kinsmen, then the half blood kinsmen could not share in the inheritance.

A contract was then executed by E. A. Kelleam and Nell Southard on the one hand and Fannie Bates and the surviving husband and children of Mrs. Klyde Bates now deceased whereby Kelleam and Nell Southard agreed to deposit $4,000.00 in the bank together with the contract (see Tr. p. 39 *et seq.*) and it was agreed that this sum should be paid to them for any interest they claim in the estate providing none of the heirs of any of the other half brothers or half sisters of the deceased came in and filed a claim. But that if, prior to final distribution any party claimed to be interested in the estate and appeared in the County Court and questioned the right of E. A. Kelleam and Nell Southard to the entire estate, then Kelleam and Southard would be entitled to withdraw the $4,000.00 in escrow. The contract also provided that it did not constitute the entering of an appearance in the County Court by Fannie Bates or the heirs of Mrs. Klyde Bates.

After the execution of this contract and before the final hearing for distribution an amended petition for approval

of final account and for decree determining heirship and distribution of the estate was filed by E. A. Kelleam and Nell Southard. (Tr. p. 43.)

This amended petition, after setting out the family tree of the Kelleams, averred that one Mary Ayres Kelleam, one and the same as M. A. Kelleam, was the mother of the deceased Leggette D. Kelleam and of E. A. Kelleam and Nell Southard, nee Kelleam, and that these three were her sole heirs and were the only heirs of the deceased Leggette D. Kelleam. The amended petition deliberately and we believe with intention to defraud all of the half blood kinsmen, went on to allege that all of the property of which Leggette D. Kelleam died seized was an ancestral estate coming from his mother to the deceased. The petition recited that the deceased owned at the time of his death an undivided seven-sixteenths of the working interest and a one-eighth of the overriding interest in the Sam Vance lease, an oil and gas lease, in Creek County, Oklahoma, describing same.

Then the petition went on to set out that the mother of the deceased during her lifetime, and as an advancement to the said Leggette D. Kelleam, in lieu of a portion of his share of her estate purchased for him all property owned by the deceased Leggette D. Kelleam at the time of his death.

Without going into the argument which will be later developed, but in order that the Court may have a better understanding of this case we desire to call attention to the fact that the mother, Mary Ayres Kelleam, died on December 4, 1928. (Tr. 100) Also in order to show how patently a fraud the foregoing petition was, together with the subsequent distribution by the County Court of Creek County, we desire to call this court's attention to numerous items which, if they were gifts, or advancements, would have been given to the decedent, Leggette D. Klleam, by his mother from the "Hereafter," as at the time he acquired them she had been dead for several years. For instance at page 99 of the

transcript, we see that the two Drumright, Oklahoma, properties were acquired by Leggette D. Kelleam, one in 1932, and the other in 1935. Also the Oklahoma City properties (Tr. 122) were acquired in 1933. The interest in the so-called Sam Vance lease was acquired in 1930. (Tr. 117) The inventory filed by the administrator also lists certain items that by no stretch of imagination can be termed ancestral, or called gifts or devises, or inherited property from the departed maternal ancestor. For instance at page 28 of the transcript appears a Ford coupe, 1936 model, and also a promissory note of R. J. and Nell Southard dated 4/6/29 for $4,000.00, a note from Grover Keely dated 6/12/1929 for $100.00. Also a note from R. J. and Nell Southard for $1,000.00 dated 9/8/1931, also a note from Pleas Carter for $25.00 dated 4/3/1935, and a note from R. J. and Nell Southard dated 9/8/1931 for $700.00, and a note from J. M. Pinkston and Lou Ann Pinkston dated 6/22/1929, for $400.00.

Thereafter on the day appointed for the hearing the County Court entered its judgment order and decree finding and determining that the estate of Leggette D. Kelleam, deceased, was a maternal ancestral estate and ordered distribution threof to E. A. Kelleam and Nell Southard.

The only notice purportedly given the half blood heirs was a notice by publication. The order appears in the transcript pages 46 to 52. On September 23, 1937, a petition to reopen the proceedings was filed (Tr. p. 123) and an amended petition was filed on December 28, 1937. (Tr. p. 125 to 128) This amended petition was filed by the children of the prior deceased's half brothers and half sisters of Leggette D. Kelleam, deceased, setting forth their relationship to the deceased and stating that they had no notice of these proceedings and that the distribution of the estate was fraudulently and collusively obtained and asking that the decree of the County Court be set aside.

The Maryland Casualty Company surety on the administrator's bond learned of these proceedings and that Dr.

E. A. Kelleam was divesting himself of title to the assets. (Tr. p. 109)

It will be noted that none of the defendants deny that E. A. Kelleam and Nell Southard were divesting themselves of the properties but admit it in their various answers. (Tr. p. 64 and 68) Obviously if the half blood heirs succeeded in vacating the order of distribution then the surety would be called upon to pay the half blood heirs if no recovery could be had by them from the administrator and Nell Southard.

Accordingly, to protect itself, a representative of the Maryland Casualty Company was sent to interview E. A. Kelleam in an effort to secure the company from harm. (Tr. pp. 104, 109) The purpose of this visit is clear from the testimony of the representative J. C. Thomas. Thomas said "We wanted this property conserved in event the heirs that brought this action in Creek County were able to successfully come in and reopen the case." "I just suggested that he put this property where it could be on hand in the event they were successful in reopening the case. I didn't have any definite proposition any certain place he should put it. He knew what I was talking about."—"I just suggested to Dr. Kelleam that it might be well to keep this property so if these people were successful in reopening the estate it would be available to pay it off"—"My idea in going to see Dr. Kelleam was to try to work out an arrangement where the Maryland Casualty Company would be protected in event there was a claim."

Thomas also testified that at the time he talked to Dr. Kelleam conveyances had been made by him and his sister, Nell Southard in an attempt to put the corpus of this estate in their children. This representative got no satisfaction. Later in the proceedings another effort to get E. A. Kelleam to indemnify or satisfy the Maryland Casualty Company was made. (See the testimony of Streeter Speakman at page 109 of the transcript and also his letter to E. A. Kelleam transcript page 111) The letter says:

"The thing that has raised their suspicion and caused them to take a hostile attitude toward you is the fact that you made a transfer of this property to your son. This of course was made without my advice or knowledge and if you had consulted me I would have advised you in the first instance to desist from such a procedure."

Meanwhile E. A. Kelleam and Nell Southard demurred to the amended petition in the County Court and on September 15, 1938, the County Court sustained the demurrer and the proceeding to reopen was dismissed. (Tr. p. 102) The case was appealed by the petitioners to the District Court of Creek County where it remained on appeal and is still pending.

The Maryland Casualty Company on June the 8th, 1938, sought relief in the United States District Court for the Northern District of Oklahoma by filing its bill of complaint making the full blood heirs as well as the half blood kinsmen of the deceased Leggette D. Kelleam defendants seeking exoneration on its bond and asking that a receiver be appointed to preserve the decedent's property pending the outcome of the dispute between the heirs (Tr. pp. 5-11) and that the property be impressed with an equitable lien to satisfy and discharge any final judgment that might be obtained between the litigating parties.

An amended complaint was subsequently filed. (Tr. pp. 55-60) The complaint and amended complaint together with the answer and cross petition of the defendant Mrs. Ethel Riddler and Mrs. Dorothy Payne and others similarly situated set out clearly the contention of this respondent. (Tr. pp. 11-22) The complaint set out that certain of the assets of the Legette D. Kelleam estate were within the Northern District of Oklahoma. (Tr. pp. 6 & 7) The defendant Mrs. Frances Kelleam was served with a chancery subpoena on June 14, 1938. On June 18, 1938, the cross petitioners filed their separate answer and cross petition wherein they asserted their claim to an interest in the

estate and joined in the application for the appointment of a receiver.

On June 23, 1938, J. M. Scott was appointed receiver of certain assets of the estate of Leggette D. Kelleam. (Tr. p. 94) These assets consisted only of the Drumright Creek County, Oklahoma, real estate and the Oklahoma City, Oklahoma, real estate and the Sam Vance oil and gas lease in Creek County, Oklahoma.

Thereafter on June the 25th, 1938, plaintiff in compliance with title 28, Sec. 118 U. S. C. A. procured issuance of an order for service on defendant outside of district. (Tr. pp. 52 and 53) Order was served upon the defendant E. A. Kelleam and Joe E. Kelleam personally at Sells, Arizona. (Tr. pp. 53 and 54) Previously a chancery subpoena had been issued and served upon the defendant Nell Southard and J. R. Southard, Jr., at Blanchard, Oklahoma, on July 17, 1938. All these four defendants after filing special pleas to the venue and jurisdiction of the court and upon such pleas being overruled they moved to strike the cross petition for want of jurisdiction of the subject matter which was overruled and the defendants then filed their answer and plea in abatement and answer to the cross petition (these various pleadings appear Tr. pp. 61 to 70). With the issues having been joined the cause was tried and for the testimony developed we refer the court to the summary of the record, evidence, and proceedings at the trial. (Tr. pp. 93 to 123) The trial court made findings of fact and conclusions of law and entered its decree. We desire at this point to controvert the statement of counsel in page 3 of the petition for certiorari as well as the statement at page 9 concerning the purpose of this respondent surety, by stating that nowhere in this record does it appear that there is any plan between the surety and the contesting claimants to circumvent the judgments of the County Court. But counsel in their brief lose sight of the fact that this action is one where a surety resorts to the Federal Court for protection from what appears by all the law and decisions of

Oklahoma to be a very hazardous situation as will be more fully developed in the argument. The court found that the estate of Leggette D. Kelleam was not an ancestral estate; that the decree of the Court was obtained by fraud and was therefore void; that the half sister and children of the prior deceased's half brothers and half sisters were heirs and entitled to share in the estate; that E. A. Kelleam and his surety were liable to the defrauded heirs; that the surety company was entitled to exoneration and to have the assets impressed with a trust. The findings of fact and conclusions of law (Tr. pp. 77 to 88) and the decree (Tr. pp. 88 to 92). This decree is in accordance with the conclusions of the court and it provided for an accounting and that if no accounting be rendered, then the lien on the property in the hands of the receiver be foreclosed.

From this decree an appeal has been taken.

ARGUMENT.

We will endeavor point by point to respond to the points raised by counsel in the brief of petitioners.

As to Petitioners' Point I.

Jurisdiction of the County Courts of Oklahoma in probate matters is exclusive original jurisdiction.

With this contention we have no quarrel, however, we submit a counter proposition:

THE UNITED STATES DISTRICT COURT, ALTHOUGH IT HAS NO JURISDICTION IN PROBATE TO REVIEW, VACATE OR SET ASIDE DECREES OF THE COUNTY COURT EXERCISING PROBATE JURISDICTION NOR TO DETERMINE HEIRSHIP, DOES, HOWEVER, HAVE POWER TO DEPRIVE A PARTY OF THE BENEFITS OF A JUDGMENT OR DECREE FRAUDULENTLY OBTAINED IN A STATE COURT, PARTICULARLY A VOID JUDGMENT.

Among the cases cited by counsel is the case of *Wells* v. *Helms, et al.*, 105 F. (2d) 402, but a study of the facts of

this decision discloses that all the purported and contesting heirs were vigorously in court and had their day in court in the probate proceedings and were found by the probate court not to be heirs. No one can read the record in the instant case, and then be familiarized with the decisions of the Supreme Court and say that the half blood heirs had their day in court until the decision of the trial judge in the instant case.

That the half blood brothers and sisters, and their heirs, where the particular half-brother or half-sister of Leggette D. Kelleam had died, were entitled to share in the estate of the deceased Leggette D. Kelleam is not disputed but is clear under the Oklahoma law of descent and distribution.

Okla. St. Ann., Title 84, Section 213:

> "When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it descends and must be distributed in the following manner:
>
> * * * * * * * * * *
>
> "Third. If there be no issue, nor husband nor wife, nor father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if the deceased, being a minor, leave no issue, the estate must go to the parents equally, if living together, if not living together, to the parent having had the care of said deceased minor."

That the estate of Leggette D. Kelleam was not an ancestral estate is clear from the facts. There were assets, both personalty and realty that were not even in existence when the mother of Leggette D. Kelleam died in 1928. Yet both Nell Southard and E. A. Kelleam in their amended petition to distribute the estate to themselves (Tr. 45) say in that petition:

> —"that the said mother of the deceased, during her life time and as an advancement to the said Leggette D. Kelleam, in lieu of a portion of his share of her

estate, and as a gift, *purchased for him all property owned by the deceased,* Leggette D. Kelleam at the time of his death."

If the estate was ancestral, the half blood heirs were excluded, if it was not ancestral they were entitled to inherit. If it was not ancestral the order of the court distributing the entire estate to E. A. Kelleam and Nell Southard was void and the court had no power to deprive the half blood heirs of their rights.

This is clearly the law in Oklahoma.

A case quite in point is that of *Beatty* v. *Beatty,* 114 Okla. 105, 242 Pac. 766. This case has never been reversed. The facts were that one S. W. Beatty died owning land in Lincoln County, Oklahoma. He left a wife. He left a son, S. W. Beatty, Jr., and three daughters, Lelia Berry, Laura Bradley, and Sadie White. There was a son, Jeff Beatty, who had predeceased S. W. Beatty, leaving Ethel Beatty and Lula Stewart and Matthew Beatty, sons and daughters.

Mrs. Beatty, widow of S. W. Beatty, died. S. W. Beatty, Jr., was appointed administrator, and administered the estate. He gave no notice to the Jeff Beatty children, did not list them as heirs and distributed the lands of old S. W. Beatty to himself and his three sisters. He claimed in the petition for appointment of administrator, and in the petition to settle the final account that he and the three sisters were the sole heirs. Final distribution was made and over two years later Jeff Beatty's children filed a partition suit in the District Court. The trial court found that the proceedings had in the County Court and the decree so rendered were and are null and void and of no effect because the Jeff Beatty children were not made parties to the administration proceedings, and had no notice thereof. The court also found that the proceedings were fraudulent, and that the final decree was fraudulent, and obtained by reason of fraud practiced upon the court in that S. W. Beatty represented to the court that he and his three sisters were

the only heirs of S. W. Beatty, deceased. The reasoning of the court is entirely applicable to the case at bar, and we refer the court to this decision as the law in Oklahoma. The court says in its opinion:

> "We can conceive of no clearer case of fraud than appears in this case on the part of the administrator, S. W. Beatty. Being fully aware of the whereabouts of these parties and of their interest in the estate, or at least of the fact that they were heirs, whether he recognized their interest or not, he makes solemn oath that he and his codefendants are the only heirs, and, though he was corresponding with Ethel Beatty in April and October, 1917, shortly before the institution of the probate proceedings herein and again shortly after, as shown by the record herein, in November, 1918, early in 1919, and in December, 1919, yet he failed to advise them of the contemplated probate proceedings or to advise the court that these parties were heirs and claimed an interest in said estate, all of which he well knew, thus perpetrating a fraud both on the court, and the judge thereof, and upon the parties.

Further, and most applicable, the court says:

> "It is very apparent from the record in this case that the fraud complained of prevented the defendants from having a fair hearing—indeed, they had no hearing at all—and that its purpose was to keep the complainants in ignorance of the pendency of the action and thus prevent them from having a trial and presenting their case fully.

We believe that this case answers nearly every contention raised by petitioners in their brief regarding the finality and sanctity of the final decree in the County Court, and clearly supports our contention that the surety had occasion to be alarmed and could see that ultimately it would be called on to respond and pay any judgment awarding the cross-petitioners their just portion of the estate.

There are other Oklahoma Cases where the Oklahoma

Supreme Court has held void various forms of fraudulent final decrees of distribution and other decrees. These cases are as follows:

Caulk v. *Lowe*, (Sup. Ct. of Okla.) 74 Okla. 191, 178 Pac. 101;
Green's Estate, 80 Okla. 256, 196 Pac. 128;
Dawkins v. *Peoples Bank & Trust Co.*, 117 Okla. 181, 245 Pac. 594;
Forgy v. *Lauphear*, 144 Okla. 245, 291 Pac. 83;
Wheeler v. *Bighcart*, 172 Okla. 262, 43 P (2) 1077.

These cases are conclusive, and when they are studied by the Court, we feel confident that the Court will conclude that the invalidity of the final decree is quite apparent, and that they will convince the Court that the alarm of the surety was not a feigned alarm, and that the exoneration of the bond by the County court was not an exoneration of the bond at all, as contended all through petitioner's brief.

Plaintiff sought in this case, not to have the United States District Court exercise probate jurisdiction, but to be exonerated and protected from harm. It had given its recalcitrant and uncooperative principal, E. A. Kelleam, two opportunities to retain control of the property he had acquired in the distribution, but had gained no cooperation; instead the property was being transferred to sons and daughters of the distributees without consideration.

The prayer for relief in the original complaint and in the amended complaint sets out clearly the purpose of the action (Tr. 10)

Respondent sought to have a receiver appointed to conserve the property belonging to the estate to await the outcome of the litigation between the Kelleam-Southard full-blood relatives, on the one side, and upon the half-blood kinsmen on the other; and to impress a lien upon the property to satisfy any claim of the adverse defendants, and to exonerate and hold this respondent harmless from any liability on the bond of E. A. Kelleam.

That it was entitled to this remedy is supported by the following authorities. Oklahoma Statutes Annotated, Title 12, Section 1551, OS, 1931, Sec. 773.

> "A receiver may be appointed * * *"
>
> "First. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probably, and where it is shown that the property or fund is in danger of being removed or materially injured."
>
> "Sixth. In all other cases where receivers have heretofore been appointed by the usages of the courts of equity."

That this respondent was entitled to proceed against its principal before it was called upon to pay under its bond, and that it had a claim in equity against its principal that it could enforce in equity is supported by statute. Oklahoma Statutes Annotated, Title 12, Section 1108, OS, 1931 Sec. 88.

> "A surety may maintain an action against his principal, to obtain indemnity against the debt or liability for which he is bound, before it is due, whenever any of the grounds exist, upon which, by the provisions of this code, an order may be made for arrest and bail, or for an attachment."

The Oklahoma Supreme Court has permitted such action for exoneration in the case of *Walton, et al.*, v. *Williams*, 5 Okla. 642, 49 Pac. 1022. In the *Walton* case plaintiffs were sureties on the bond of agents for a brewing company given by the agents for the faithful performance of their duty. Plaintiffs filed a suit alleging that the principals were short in their accounts and had defaulted the conditions of the bond and asked an indemnifying judgment for the amount of the shortage. A demurrer was sustained

and an amended petition was sought to be filed which was refused by the court. In the amended petition plaintiffs alleged the shortage, the contract of suretyship, and that the brewing company was notifying plaintiffs of the default, and had made demand upon the principal debtors for payment of the money. The court refused to permit the amended petition to be filed and dismissed the cause. Before the demurrer was sustained an attachment had been issued by plaintiffs on property of the principal obligors and also a receiver had been appointed for one of the debtor's interest in a drug store. In the amendment to the petition it was also alleged that the defendants were seeking to dispose of their property without indemnifying the plaintiffs.

In construing the statute on the rights of sureties the court said:

> "In this case the plaintiffs in both petitions prayed that the defendants be ordered and adjudged to indemnify them, and that, failing so to do, plaintiffs have judgment for the amount of their liability as sureties, and the petitions set forth the grounds which would authorize an order of attachment. This statute was meant to change the common law rule, so that a surety should not be compelled to stand by and see the principal, for whose obligations he was bound, fraudulently dispose of his property, and leave his just debts to be paid by those whom he had deluded into becoming his sureties. The court erred in sustaining the demurrer to the petition and in refusing to permit the piaintiffs to file an amended petition."

Further, on the question of a surety's right of exoneration there are some interesting cases which refute petitioners' contention that the situation was a novel and unprecedented one, and which show how the courts protect this right of a surety.

Morley Construction Co., et al., v. *Maryland Casualty Company*, (C. C. A. 8th Cir., 1937) 90 F. (2d) 976:

1. " 'Quia timet' is a name given to a bill in equity filed by a person fearing some future injury to his rights in property, real or personal, from the negligence, fault, or fraud of another."

2. "Where surety on construction bond given in connection with public building contract, seeking to compel application of installments paid on contract to payment of labor and materials going into building, alleged that outstanding bills amounted to more than $100,000, that the final estimate together with balance of funds on hand from prior installments which had been paid did not equal that sum, and that insolvent construction company unless restrained would convert or conceal funds, resulting in irreparable loss to surety, surety was entitled to remedy of exoneration."

Certiorari was denied 302 U. S. 748, 82 L. Ed. 578, 58 S. C. 266; rehearing denied, 302 U. S. 779, 82 L. Ed. 602, 58 S. C. 362.

In that case the relief sought by the surety was to impress a trust or lien upon funds paid its principal, the contractor of a public building, and the federal government had paid the contractor by checks which were deposited in a Kansas City, Mo. bank. The Supreme Court of the United States in the case of *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 81 L. Ed. 593, held that the cause should be remanded to the Court of Appeals to pass upon the question whether relief in the form of exoneration is proper under the circumstances. This was done in 90 F. (2) 976, and certiorari denied as above indicated.

There are other cases illustrative of a surety's right of exoneration that are strong and well reasoned cases.

Glades County, Fla., v. *Detroit Fidelity and Surety Company*, (C. C. A. 5th Cir.) 57 F. (2) 449. This case is quite instructive.

"As between surety and bankrupt contractor whose trustee refused to pay material men, equity of exoneration held to arise without payment by surety and without suit against it."

Receivership is a proper remedy for enforcing the right of exoneration.

Sanford v. *United States Fidelity & Guaranty Co.*, (Ga. Sup. Ct. 1902) 116 Ga. 689, 43 S. E. 61.
Central Surety & Ins. Corporation, et al. v. *Bagley*, (Dist. Ct. S. D. Calif., Cent. Div.) 44 F. (2d) 208.

There are many other cases where equity has recognized a surety's rights of exoneration and enforced it in many ways. Injunctions have been granted, receivers appointed, and equitable garnishments have been granted, and funds traced and applied, as stated in *Glades County, Florida* v. *Detroit Fidelity & Surety Co.*, previously cited, at page 452, of 57 F. (2).

Petitioners in their brief at page 18 say nothing about the ancestral feature of the case, but do claim that the failure to give personal notice to the claimants who they contended were not heirs, or to assert that they were not heirs, was not fraud. To show how petitioners and their counsel who engineered the distribution were ignoring the well settled law on what is or is not ancestral property in order to persuade the county court that the estate was ancestral we refer to the general law upon this subject as set out in 18 CJ. p. 818, Sec. 20. (5). At page 819, the text states:

> "On the other hand, property of the intestate does not possess an ancestral quality where it was acquired by the intestate with the proceeds of ancestral property, or where the property was acquired by exchanging ancestral property therefor, * * *."

The petitioners shun this entire feature of the case because if the estate was not an ancestral one, the decree is void, and our contention on this point, we submit, is absolutely unanswerable.

As to Petitioners' Point II.

Counsel state as their second point: That jurisdiction was duly invoked and exercised prior to the institution of the instant proceedings as to both the subject matter and the parties.

This point is merely a repetition of the first point that the county court had exclusive jurisdiction. In answer to this point we call attention to the quotation from the record at page 107, where the following question was asked of Mr. Thomas. "Q. Mr. Green did appear in the county Court?" "A. That is right, he was representing the Maryland Casualty Company." There is nothing in the record to show that the appearance of the Maryland Casualty Company in the proceedings in the County Court of Creek County was other than a special appearance and motion. (Tr. 101)

The inference, therefore, that the surety was a party to the proceeding in the County Court is not justified by the record.

We have no quarrel with the authorities that no personal notice of a decree of distribution is needed. However, as has been previously shown, where heirs have had no notice of the petition for appointment of administrator and have not been named as heirs in the petition, the order distributing property of a decedent is void as to them.

Counsel at page 17 of the brief of petitioner cite *Wheeler* v. *Bigheart*, 172 Okla. 262, 43 P. (2) 1028, as authority for the proposition that the County Court had jurisdiction to review its own decree for fraud or irregularities. Even though the County Court sustained the demurrer, the question had not been settled on appeal, the case cited is ample authority for our contention that a decree fraudulently obtained distributing property to the exclusions of known heirs is a void decree. Therefore we submit that it is clear from the facts in the case that the cross petitioners who are the defrauded heirs will some day call upon the surety to pay the equivalent of that which was wrongfully taken

from them, and therefore the surety is entitled to the equitable remedy of exoneration.

As to Petitioners' Point III.

Counsel state as the petitioners third point: It was the duty of the federal court when suit was there filed to dismiss for want of jurisdiction.

Petitioners' contentions under this point will be divided under (a), (b), (c)(1), and (c)(2), and will be discussed accordingly.

(a)

Because the jurisdiction of the County Court had already been invoked.

In response to this contention, this point we believe is the same as point II. Counsel state that federal courts do not have general probate jurisdiction to review judgments of the state courts. Such is not this case and as we have previously pointed out this is a suit in exoneration by a surety, wherein the cross petitioner, who are the defrauded heirs seek to join in the litigation in the federal court once the action had been filed by the surety for exoneration. One of the cases cited by counsel under this section of their brief is that of *Byers* v. *McAuley,* 149 U. S. 608, 37 L. Ed. 867. This case is not in point and even goes so far as to hold in support of our contention:

> "Where the estate of a deceased is ready for distribution, but no adjudication has been made as to the distributees, the Circuit Court can entertain jurisdiction in favor of citizens of other states to determine and award their shares in the estate."

The *Byers* case does hold that the federal courts will not disturb the possession of the administrator duly appointed by the state probate court. However, in the instant case the federal court is in no manner trying to oust the probate court of jurisdiction, or disturb the administrator in his possession as administrator, but is merely lending its

equitable aid to assist a surety in salvaging something of the wreckage of a badly administered estate.

Regarding *Smith* v. *Jennings*, (C. C. A. 5th Cir.) 238 Fed. 48, we desire to urge that this case is not in point for it is a case where heirs of an estate sought to have a receiver appointed pending the probate of an estate by the state court. The grounds urged for the appointment were that the appointment of temporary administrators was invalid because of fraud, and because the assets of the estate were being dissipated. The Circuit Court of Appeals held that federal courts had no authority to stay proceedings in the state court, and further that the assets of the estate were amply protected by a substantial bond.

In support of the contention of this respondent, the court does say that relief to set aside judgment obtained by fraud can be had as against a final judgment of the state court when there is an attempt to enforce it, citing *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492.

The United States Supreme Court has held in *Marshall* v. *Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870, that the United States Courts, in the exercise of equity powers, and where diversity of citizenship gives jurisdiction over the parties, may deprive a party of the benefit of a judgment or decree fraudulently obtained in a state court, as the decree of the federal court operates on the parties, and not on the state court.

The case of *Hewitt* v. *Hewitt*, (C. C. A. 9th Cir.) 17 F. (2) 716 is another case showing the powers of a court of equity. This case will be more fully discussed by the other respondents who were cross-petitioners, but we refer to it to show the court that federal courts in the exercise of their equity jurisdiction can deprive a party of a judgment fraudulently obtained in the state court:

> 1. "A court of the United States, in the exercise of its equity powers, and where diversity of citizenship gives jurisdiction over the parties, may deprive a party

of the benefit of a judgment or decree fraudulently obtained in a state court, since its decree operates on the parties and not on the state court."

"2. A fiduciary relation exists between an administrator and the heirs of the estate."

3. "The administratrix of the estate of her deceased husband, who died intestate, had been told by him that, previous to his marriage to her, he had adopted a son, but had heard that the son was dead. Later, and within two years before his death, he made a will, of which she knew, which contained provision for the son. The administratrix did not inform the probate court nor her counsel of such facts, and the estate was settled aid distributed to her and a daughter without any reference to or knowledge of the adopted son. Held, that her silence constituted a fraud upon him against which a federal court of equity would grant relief by requiring the distributee to restore his share of the estate."

The applicability of this case will be obvious upon a reading of the facts.

(b)

Under their third point petitioners assert that the action was not local under 28 U. S. C. A., Secs. 116-118.

There are two phases of this point that must be answered. Counsel say that the surety had no lien upon the decedent's estate by contract or otherwise. The other is that relief *in personam* was granted when the action was *in rem*. In order to analyze and answer this contention we refer to the section of the statute under which this action was brought against E. A. Kelleam and Joe Kelleam, who were citizens and residents of Arizona. We submit there is no question about the jurisdiction of the court over Mrs. Nell Southard and J. R. Southard, Jr., as the record shows they were served with process in the Eastern District of Oklahoma (Tr. 95) although this was done after the receiver was appointed.

The statute under which the action was filed is as follows: Title 28, U. S. C. A., Section 118: "Absent Defendants in Suits to Enforce Liens."

"When in any suit commenced in any district court of the United States to enforce any *legal* or *equitable lien* upon or *claim* to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State. Any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said dis-

trict court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law." (Italics supplied)

That the surety had a claim in equity for exoneration upon the land and property which was sequestered by the receiver sufficient to satisfy the requirement of the statute that an equitable lien or claim existed is clear from the facts and supported by the authorities. When the administrator distributed the property to himself and his sister Nell Southard, under the case of *Hewitt* v. *Hewitt,* those parties took possession and title of the property impressed with an equitable lien or trust for the defrauded heirs.

That a surety has an equitable claim against the property is supported by the following decisions.

Morley Construction Co., et al. v. *Maryland Casualty Co.*, 90 F. (2) 976;
Glades County, Fls., v. *Detroit Fidelity and Surety Co.*, 57 F. (2) 449;
Southwestern Surety Ins. Co. v. *Wells et al.*, 217 F. 294;
Walton v. *Williams*, 5 Okla. 262, 43 P. (2) 1028;
Des Moines Bridge & Iron Works v. *Plane et al.*, 163 Iowa 18, 143 NW 866;
Taylor v. *Harris' Admr. et al.*, 164 Ky. 654, 176 SW 168;
Republic Nat. Bank & Trust Co., et al. v. *Massachusetts Bonding & Ins. Co.*, (C. C. A. 5th Circuit) 68 F. (2) 445.

In their second point Counsel also seeks to state that the decree showed no relief *in rem* but that the relief was granted *in personam.* We submit that the decree of the trial court makes no attempt to act in any way except against the *res.* (Tr. 88 *et seq.*)

That such a lien or equitable claim is created by the act of the administrator in distributing the property, and ex-

isted when the suit was filed and before, is clear from the facts and supported by authority.

Porter et al. v. *Cooke et al.*, 63 F. (2) 637.

A suit to establish a trust in real estate may be brought under Section 118, U. S. C. A., Title 28, though it also seeks an accounting, *Porter Land and Water Co.* v. *Baskin*, 43 F. 323.

The facts were also sufficient to vest the United States Court for the Northern District of Oklahoma with jurisdiction. The controversy involved real estate and personalty of a fixed character in Creek County, Oklahoma, within the Northern District of Oklahoma. The controversy also involved real estate which lay in districts within the same state. Title 28, U. S. C. A. Sec. 116. This section was applicable to support the jurisdiction.

> "Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in the District Court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted."

We feel certain that the court below was correct in holding that the action was a local action, and that the trial court properly had jurisdiction.

(c) (1)

Petitioners state further that there was no diversity of citizenship between the real parties in interest as required by the Statute.

Further that the parties should be aligned in accordance with their actual interests to test jurisdiction. We believe that there is only necessity to refer to one case to show that petitioners are wrong in their contention.

Republic Nat. Bank & Trust Co., et al. v. *Massachusetts Bonding & Ins. Co.*, (C. C. A. 5th Cir.) 68 F. (2) 445.

> "That some of resident defendants in nonresident surety's action seeking application of retained fund to discharge of claim favored relief prayed, occasioned no realignment of parties to destruction of surety's right to federal jurisdiction.
>
> "Where surety sued as nonresident seeking application of retained fund to discharge obligations and made numerous resident claimants parties defendant, dependent jurisdiction arose to settle disputes, even between citizens of same state and involving amount less than $3,000, so far as necessary fully to administer fund."

We believe that this decision also supports clearly the jurisdiction of the trial court, and the court expressly says that no realignment of parties is necessary.

(C) (2).

Petitioners assert under this phase of the brief that the burden of proof of the jurisdictional facts was upon this respondent. We assert that diversity of citizenship was alleged in the complaint and was proven to the satisfaction of the trial court.

Respondent (Plaintiff below) Maryland Casualty Company, is alleged to be a Maryland corporation. Defendant E. A. Kelleam, in his separate answer (Tr. 61 at p. 62) admits this allegation. The bill of complaint alleges that E. A. Kelleam is a resident of Sells, Arizona, to which allegation the defendant filed an answer admitting he was such a resident. (Tr. p. 62) Likewise Joe Kelleam similarly filed an answer to a similar allegation (Tr. p. 65).

In the bill of complaint it was alleged that all of the other defendants are residents and *citizens* of the State of Arkansas, and the State of Oklahoma. (Tr. p. 6.) In the answer and cross petition allegations as to where each relative and party resided are set out in detail with the exception of that of Clifford Kelleam, and Kelleam Hall. (Tr. pp. 11 and 12.)

There was testimony (Tr. 118-19) regarding where all the defendants and cross petitioners lived. Mrs. Ethel Riddler, testified that she lived in Ft. Smith, Arkansas, and that all of these named heirs, referring to a list of kin-folks she had, live either in Oklahoma, Arkansas, or California. There was certainly evidence that all of the defendants and cross-petitioners lived in some state other than the state wherein plaintiff corporation was organized. Even as to Kelleam Hall, it was alleged in the original complaint that he was a resident and citizen of Oklahoma or Arkansas, along with the other defendants (Tr. p. 6) and the testimony of Mrs. Ethel Riddler (*supra*) was that he lived either in Oklahoma, Arkansas or California.

Also the trial court from all the evidence found that places of residence of the various heirs was as set out in the findings of fact (Tr. pp. 78-79). Also the evidence at the trial was sufficient to satisfy the trial court as to citizenship, as the trial court found that diversity of citizenship between the plaintiff and the defendants, and the defendants and cross-petitioners, existed. (Tr. p. 85.)

Also in this connection on the question of residence, the court could properly consider for purposes of determining citizenship and residence and jurisdiction, the averments of the defendant E. A. Kelleam and Nell Southard in their amended petition for approval of final account and for decree determining heirship and distribution. (Tr. pp. 43 and 44.)

In addition to this we are aided by the presumption that a person's residence carries with it a presumption of citizenship of the place where he resides unless there is positive testimony to disprove the citizenship.

> *Devanney* v. *Hanson, et al.*, 60 W. Va. 3, 53 S. E. 603;
> *In re Person's Estate, Wallerstedt, Consul,* v. *Trank,* 146 Minn. 230, 178 N. W. 738;
> *Collins* v. *Ashland,* 112 F. 175.

No evidence to rebut the presumption was introduced by the defendants.

CONCLUSION.

In addition to all the foregoing, we conclude with the assertion that nothing has been raised in petitioners brief to invoke the jurisdiction of this court under a writ of certiorari. Petitioners rely on Para. 5 (b) of Rule 38. We submit that an analysis of all the points raised under their petition or brief disclose that no showing has been made sufficient to entitle them to a writ of certiorari. We assert that the decision of the Circuit Court of Appeals does not conflict with any decisions of any other Circuit Court of Appeals. The court's decision was not in conflict with any Oklahoma decisions, but on the contrary followed them. The case does not present any question of Federal law that has not been settled by this Court. Its decision conflicts with no other decisions of this Court. The decision does not depart from the accepted and usual course of judicial proceedings, but on the contrary substantial justice was done.

The evidence in this case is clear that a fraud was committed upon the half-blood heirs of Leggette D. Kelleam, deceased. These heirs are likely to have a recovery of their portion of the estate. If they cannot reach their share in the hands of those who wrongfully obtained it, naturally the surety, this respondent, will be called upon to pay, and to protect its right of exoneration this action was brought. The record in this case disclosed sufficient evidence to vest the United States District Court for the Northern District of Oklahoma with jurisdiction.

The facts in this case clearly support the contentions of this appellant that the original probate decree distributing the estate to the full-blood heirs was a void and wrongful decree because procured by fraud. No one has yet denied that the half-blood heirs are entitled to recover.

If this surety is called upon to pay and does pay, then unless this decision can be sustained and affirmed, there will be no assets left in the hands of E. A. Kelleam and Nell Southard from which it can reimburse itself after it has paid the defrauded heirs under its bond. The petition for certiorari should therefore be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 349.

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM, AND JOE R. SOUTHARD, JR., *Petitioners,*

v.

MARYLAND CASUALTY COMPANY, OF BALTIMORE, A CORP., MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, J. K. PERKINS, MRS. F. BATES, GLEN PERKINS, BESSIE MATHEWS, MRS. ELOUISE KLUP, LEGGETTE HALL, LAMAR HALL, MARGUERITE BRADLEY KELLEAM, MARY KATE HALL, KELLEAM HALL, CLIFFORD KELLEAM, KATHLEEN KELLEAM, DR. FANNIN KELLEAM, FRANCIS KELLEAM, MRS. JIMMIE KELLEAM AND ROBERT KELLEAM, *Respondents.*

BRIEF OF MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, RESPONDENT, IN ANSWER TO BRIEF OF PETITIONERS.

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INDEX.

	Page
Statement and History of the Case	1
Specifications of Error	10
Summary of Argument	10
Argument and Authorities	12
"I. Jurisdiction of the County Courts of Oklahoma in Probate Matters is Exclusive Original Jurisdiction."	15
"II. That Jurisdiction Was Duly Invoked and Exercised Prior to the Institution of the Instant Proceeding as to Both the Subject Matter and the Parties"	16
"III. The Judgment of the County Court Refusing to Vacate the Decree Was in Conformity to Local Law"	19
"IV. It Was the Duty of the Federal Court to Sustain the Plea of the Petitioners to Dismiss the Bill of the Surety for Want of Jurisdiction at the Trial"	21
"V. It Was the Duty of the Court to Sustain Motion to Dismiss Both the Bill and the Cross Petition at the Trial for Want of Jurisdiction"	26
Conclusion	31

CASES CITED.

Anderson v. Watt, 138 U. S. 694, 11 S. Ct. 449, 34 L. Ed. 1078	28
Beatty v. Beatty, 114 Okla. 105, 242 Pac. 766	13
Carney v. Commonwealth O. & G. Co. (D. C. Kans. 1933) 5 Fed. Sup. 304	15
Caulk v. Lowe (Sup. Ct. of Okla.) 74 Okla. 191, 178 Pac. 101	13
Central Surety & Ins. Corporation, et al. v. Bagley, (Dist. Ct. S. D. Calif. Cent. Div.) 44 F. (2nd) 208	25
Charlotte Weyant et al., Respt. v. Utah S. & T. Co., Appt. 182 P. 189; 9 A. L. R. 1119	19

Page

Commonwealth Trust Co. v. Bradford, 297 U. S. 613, 619, 56 S. Ct. 600, 80 L. Ed. 920 15
Continental Ins. Co. v. Rhoads, 119 U. S. 237, 7 S. Ct. 193, 30 L. Ed. 380 27
Dawkins v. Peoples Bank & Trust Co., 117 Okla. 181, 245 Pac. 594 14
Desmore v. U. S., 93 U. S. 605, 23 L. Ed. 959 28
Des Moines Bridge & Iron Works v. Plane et al., 163 Iowa 18, 143 N. W. 866 28
Exendine v. Iron, 4 P. (2) 1035, 153 Ok. 177 19
Fidler v. Roberts, 7 Cir, 41 F. 2nd 305 27
Forgy v. Lamphear, 144 Okla. 245, 291 Pac. 83 14
Glades County, Florida v. Detroit Fidelity & Surety Co., 449, 57 F. (2) 25, 28
Green's Estate, 80 Okla. 256, 196 Pac. 128 13
Halsted v. Buster, 119 U. S. 341, 7 S. Ct. 276, 30 L. Ed. 462 27
Hartford A. & I. Co. v. Goldberg, 61 P. (2) 704, 178 Ok. 75 17
Hewitt v. Hewitt, et al., 17 Fed. (2) 716 16
Hills v. F. S. Harmon & Co., 56 Fed. (2) 662 30
Howe v. Howe & Owen Ball Bearing Co., 8 Cir. 154 F. 820 27
Johnson v. Petty, 118 Ok. 178, 246 P. 848 19
Mahon v. Somers, et al. cc Ohio, 112 F. 174 28
Marshall v. Holmes, 141 U. S. 589, 12 S. Ct. 62, 35 L. Ed. 870 16
Morley Construction Co. v. Maryland Casualty Co., 300 U. S. 185, 81 L. Ed. 593 25
Morley Construction Co. et al. v. Maryland Casualty Company, (C. C. A. 8th Cir. 1937) 90 F. (2nd) 976 ..... 24, 28
Porter et al. v. Cook, 63 Fed. (2) 637 29
Porter Land & Water Co. v. Baskin, 43 Fed. 323 29
Primos Chemical Co. v. Fulton Steel Co., 254 Fed. 455. 30
Princess Lida of Thurn and Taxis v. Thompson, 305 U. S. 456, 59 S. Ct. 275, 281, 83 L. Ed. 285 15
Realty Holding Co. v. Donaldson, 268 U. S. 398, 45 S. Ct. 521, 69 L. Ed. 1014 27
Republic Nat. Bank & Trust Co. et al. v. Massachusetts Bonding & Ins. Co. (C. C. A. 5th Circuit) 68 Fed. (2) 445 ..... 28, 29

Page

Robertson v. Cease, 97 U. S. 646, 24 L. Ed. 1057 27
Sanford v. United States Fidelity & Guaranty Co., (Ga. Sup. Ct. 1902) 116 Ga. 689, 43 S. E. 61 25
Security Trust Co. v. Black River Nat'l Bank, 187 U. S. 211, 23 Suppl. Ct. Rep. 52, 47 L. ed. 147 21
Southwestern Surety Ins. Co. v. Wells, et al., 217 F. 294 28
Sun Printing & Publishing Ass'n v. Edward, 194 U. S. 377, 24 S. Ct. 696, 48 L. Ed. 1027 27
Taylor v. Harris' Admr. et al., 164 Ky. 654, 176 S. W. 168 28
Tyler et al. v. Stanolind Oil & Gas Co., 77 Fed. (2) 802. 30
Walton v. Williams, 5 Okla. 262, 43 Pac. (2) 1028... 28
Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33, 44, 30 S. Ct. 10, 54 L. Ed. 80 15
Wolfe v. Insurance Co., 148 U. S. 389, 13 S. Ct. 602, 37 L. Ed. 493 27
Wheeler v. Bigheart, 172 Okla. 262, 43 P. (2) 1077.... 14

STATUTES CITED.

Chap. 225, 43 Stat. 938, 28 U. S. C. A. 347; Para. 5 (b) of Rule 38 9
Okla. St. Ann. Title 58, Sec. 127; O. S. 1931, Sec. 1142.. 2
Okla St. Ann. Title 58, Sec. 128; O. S. 1931, Sec. 1143.. 2
Okla. St. Ann, Title 84, Sec. 221; O. S. 1931, 1626.... 3
O. S. A. title 12, Sec. 1108 23
O. S. A. title 12, Section 1109 23
O. S. A. title 58, chapter 3, Sec. 127 17
O. S. A. title 84, Sec. 213 13
Section 88 Oklahoma Statutes 1931 23
Section 116, title 28 U. S. C. A. 22
Sec. 116 U. S. C. Ann. Title 28 (Judicial Code Sec. 55) 24
Sec. 118 U. S. C. A. title 28 ..... 8, 22, 29
Section 240 of the Judicial Code as amended by the Act of February 13, 1925 9
U. S. C. Ann. Title 12, Section 118 (Judicial Code Sec. 57) 24
9 A. L. R., page 1123 19
302 U. S. 748, 82 L. Ed. 578, 58 S. C. 266..... 24
302 U. S. 779, 82 L. Ed. 602, 58 S. C. 362..... 24
90 F. (2d) 976 25

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 349.

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM, AND JOE R. SOUTHARD, JR., *Petitioners,*

v.

MARYLAND CASUALTY COMPANY, OF BALTIMORE, A CORP., MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, J. K. PERKINS, MRS. F. BATES, GLEN PERKINS, BESSIE MATHEWS, MRS. ELOUISE KLUP, LEGGETTE HALL, LAMAR HALL, MARGUERITE BRADLEY KELLEAM, MARY KATE HALL, KELLEAM HALL, CLIFFORD KELLEAM, KATHLEEN KELLEAM, DR. FANNIN KELLEAM, FRANCIS KELLEAM, MRS. JIMMIE KELLEAM AND ROBERT KELLEAM, *Respondents.*

BRIEF OF MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, RESPONDENT, IN ANSWER TO BRIEF OF PETITIONERS.

STATEMENT AND HISTORY OF THE CASE.

In order to give this Honorable Court, in the beginning, a comprehensive understanding as to what led up to the suit at bar and to correct certain inaccuracies and supply certain omissions that are not shown in the statement of the case by the petitioners, we give the following history and make the following statements concerning the same.

This is an action by a surety on an administrator's bond for protection from a void distribution of the assets of the estate to the exclusion of certain heirs of the decedent. These omitted heirs sought to set aside the void distribution of the estate and from the facts it appeared quite likely under the laws of the State of Oklahoma that the omitted heirs would succeed in vacating the void order of distribution and would then proceed against the surety on the administrator's bond because certain assets of the estate were or had already been placed in hands other than those of the distributees and therefore the surety, alarmed, sought enforcement of its equitable remedy of exoneration.

All references herein to pages in transcript of the record refer to the printed record in this Honorable Court.

Leggette D. Kelleam, a resident of Creek County, Oklahoma, died intestate August the 8th, 1936. (Tr. p. 21 and Tr. p. 67) His heirs according to the findings of the trial court, were those whose names appear in the transcript at pages 68 and 69.

On August 25, 1936, E. A. Kelleam and Nell Southard, nee Kelleam, full brother and sister of the deceased Leggette D. Kelleam, filed a petition in the County Court of Creek County for the appointment of E. A. Kelleam as administrator. (See T. p. 2) In this petition they alleged that they were the sole and only surviving heirs. They omitted giving the names, ages, and residence of other heirs of the deceased as required by the Oklahoma Statute (Okla. St. Ann. Title 58, Sec. 127) (O. S. 1931, Sec. 1142), and gave no notice as required by the statutes. (Okla. St. Ann. Title 58, Sec. 128 (O. S. 1931, Sec. 1143)

On the same day without notice E. A. Kelleam was appointed administrator and duly qualified as such by filing and executing a bond in the sum of $12,000, upon which bond this respondent Maryland Casualty Company is surety. (Tr. p. 24) He filed an inventory (Tr. p. 26). Assets exceeding $25,000.00 were listed. He filed a final report, which report is omitted from the transcript in this

Court by stipulation of the parties as not pertinent to this appeal.

He filed his petition for determination of heirship and for a decree of distribution, again alleging that he and his sister were the sole heirs of Leggette D. Kelleam, deceased.

All of the remaining half brothers and half sisters and children of deceased's half brothers and half sisters were completely omitted from this request for distribution.

Prior to the hearing of this final account and distribution, Fannie Bates, a half-sister and the surviving children of Mrs. Klyde Bates learned of the probate proceedings and contacted E. A. Kelleam and Nell Southard concerning same.

It is important to note at this point, that under the laws of descent and distribution in Oklahoma, heirs of the decedent who were half-blood kindred inherited equally with these of the whole blood. (Okla. St. Ann, Title 84, Sec. 221) (O. S. 1931, 1626)

> "Kindred of the half-blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance."

If the estate of Leggette D. Kelleam was an ancestral estate, that is, coming to him by descent, devise or gift of some one other than an ancestor of the half blood kinsmen, then the half-blood kinsmen could not share in the inheritance.

A contract was at this time executed by E. A. Kelleam and Nell Southard on the one hand and Fannie Bates and the surviving husband and children of Mrs. Klyde Bates, now deceased, whereby E. A. Kelleam and Nell Southard agreed to deposit $4000.00 in the bank, together with the contract (see Tr. pp. 29 to 32), and it was agreed that this sum should be paid to them for any interest they claim in the estate providing none of the heirs of any of the other

half-brothers or half-sisters of the deceased came in and filed a claim. But that if, prior to final distribution any party claimed to be interested in the estate and appeared in the County Court and questioned the right of E. A. Kelleam and Nell Southard to the entire estate, then E. A. Kelleam and Nell Southhard would be entitled to withdraw the $4000.00 in escrow. The contract also provided that it did not constitute the entering of an appearance in the County Court by Fannie Bates or the heirs of Mrs. Klyde Bates.

After the execution of this contract and before the final hearing for distribution an amended petition for approval of final account and for decree determining heirship and distribution of the estate was filed by E. A. Kelleam and Nell Southard (Tr. p. 32).

This amended petition, after setting out the family tree of the Kelleams averred that one Mary Ayres Kelleam, one and the same as M. A. Kelleam, was the mother of the deceased Leggette D. Kelleam and of E. A. Kelleam and Nell Southard, nee Kelleam, and that these three were her sole heirs and were the only heirs of the deceased Leggette D. Kelleam. The amended petition deliberately, and we believe with intention to defraud all of the half-blood kinsmen, went on to allege that all of the property of which Leggette D. Kelleam died seized was an ancestral estate coming from his mother to the deceased. The petition recited that the deceased owned at the time of his death an undivided seven-sixteenths of the working interest and a one-eighth of the overriding interest in the Sam Vance lease, an oil and gas lease in Creek County, Oklahoma, describing same.

The petition then goes on to set out that the mother of the deceased during her lifetime, and as an advancement to the said Leggette D. Kelleam, in lieu of a portion of his share of her estate, purchased for him all property owned by the deceased Leggette D. Kelleam at the time of his death.

At this point we wish to call special attention to the fact that the mother, Mary Ayres Kelleam, died on December 4,

1928. (Tr. 90) Also to show how rank a fraud the foregoing petition was, together with the subsequent distribution by the County Court of Creek County, we desire to call this Court's attention to numerous items which could not be gifts, or advancements, for they were acquired by the decedent, Leggette D. Kelleam, long after the death of his mother. For instance, at page 89 of the transcript, we see that the two Drumright, Okla., properties were acquired by Leggette D. Kelleam, one in 1932 and the other in 1935. Also the Oklahoma City properties (Tr. 112) were acquired in 1933. The interest in the so-called Sam Vance lease acquired in 1930. (Tr. 107) The inventory, the administrator filed, also lists certain items, that by no stretch of the imagination can be termed ancestral, or called gifts or devises, or inherited property from the departed maternal ancestor. For instance, at pages 27 and 28 of the transcript appears a Ford coupe, 1936 model, and also a promissory note of R. J. and Nell Southard dated 4/6/29 for $4000.00; a note from Grover Keely dated 6/12/29 for $100.00; a note from R. J. and Nell Southard for $1000.00 and dated 9/8/1931; a note from Pleas Carter dated 4/3/1935 for $25.00; a note from R. J. and Nell Southard dated 9/8/1931 for $700.00; a note from J. M. Pinkston and Lou Ann Pinkston for $400.00 dated 6/22/1929.

Thereafter, on the day appointed for the hearing the County Court entered its judgment order and decree finding and determining that the estate of Leggette D. Kelleam, deceased, was a maternal ancestral estate and ordered distribution thereof to E. A. Kelleam and Nell Southard.

The only notice claimed to have been given to the half-blood heirs was a notice by publication, which appears in the transcript pages 35 to 41. On September 23rd, 1937, a petition to reopen the proceedings was filed (Tr. p. 133) and an amended petition was filed on December 28th, 1937. (Tr. pp. 115 to 118) This amended petition was filed by the children of the prior deceased's half brothers and half sisters of Leggette D. Kelleam, deceased, setting forth their relationship to the deceased and stating that they had no notice of these

proceedings and that the distribution of the estate was fraudulently and collusively obtained and asking that the decree of the county court be set aside.

The Maryland Casualty Company, surety on the administrator's bond, learned of these proceedings and that Dr. E. A. Kelleam was divesting himself of title to the assets. (Tr. p. 100)

It is to be noted that none of the defendants deny that E. A. Kelleam and Nell Southard were divesting themselves of the properties but all admit it in their various answers. (Tr. pp. 50 to 55) Obviously if the half-blood heirs succeeded in vacating the order of distribution, or having same vacated for fraud, then the surety surely would be called upon to pay the half-blood heirs if no recovery could be had by them from E. A. Kelleam and Nell Southard, distributees under this void order.

Accordingly, to protect itself, a representative of the Maryland Casualty Company was sent to interview E. A. Kelleam in an effort to secure the company from harm. (Tr. pp. 95 to 100) The purpose of this visit is clear from the testimony of the representative J. C. Thomas. Thomas said, "We wanted this property conserved in event the heirs that brought this action in Creek County were able to successfully come in and reopen the case". "I just suggested that he put this property where it could be on hand in the event they were successful in reopening the case. I didn't have any definite proposition—any certain place he should put it. He knew what I was talking about." * * * "My idea in going to see Dr. Kelleam was to try to work out an arrangement where the Maryland Casualty Company would be protected in event there was a claim."

Thomas also testified that at the time he talked to Dr. Kelleam, conveyances had been made by him and his sister, Nell Southard, in an attempt to put the corpus of this estate in their children. This representative got no satisfaction. Later in the proceedings another effort to get E. A. Kelleam to indemnify or satisfy the Maryland Casualty Company was made. (See the testimony of Streeter Speakman at

page 100 of the transcript and also his letter to E. A. Kelleam, transcript page 101.) The letter says:

> "The thing that has raised their suspicion and caused them to take a hostile attitude toward you is the fact that you made a transfer of this property to your son. This of course was made without my advice or knowledge, and if you had consulted me I would have advised you in the first instant to desist from such a procedure."

After the filing of the suit herein, E. A. Kelleam and Nell Southard demurred to the amended petition to reopen the case in the County Court of Creek County and on September 15, 1938, the County Court sustained the demurrer and the proceeding to reopen was dismissed. (Tr. pp. 92-93) The case was appealed by the petitioners to the District Court of Creek County where it remained on appeal and is still pending, so far as this litigant knows.

The Maryland Casualty Company on June the 8th, 1938, sought relief in the United States District Court for the Northern District of Oklahoma by filing its bill of complaint making the full-blood heirs, as well as the half-blood kinsmen of the deceased Leggette D. Kelleam, defendants, seeking exoneration on its bond and asking that a Receiver be appointed to preserve the decedent's property, which had been distributed by the alleged decree procured by fraud, pending the outcome of the dispute between the heirs (Tr. pp. 5-10) and that the property be impressed with an equitable lien to satisfy and discharge any final judgment that might be obtained between the litigating parties.

Subsequently an amended complaint was filed. (Tr. pp. 45-49) The complaint set out that certain of the assets of the Leggette D. Kelleam estate were within the Northern District of Oklahoma. (Tr. pp. 6 and 7) The defendant, Mrs. Frances Kelleam, was served with a chancery subpoena on June 14, 1938. On June 18th, 1938, the cross-petitioners filed their separate answer and cross-petition wherein they asserted their claim to an interest in the estate and joined in the application for the appointment of a receiver.

On June 23rd, 1938, J. M. Scott was appointed Receiver of certain assets of the estate of Leggette D. Kelleam. (Tr. p. 84) These assets consisted only of the Drumright Creek County, Oklahoma, real estate and the Oklahoma City, Oklahoma, real estate and the Sam Vance oil and gas lease in Creek County, Oklahoma.

Thereafter on June the 25th, 1938, plaintiff in compliance with title 28, Sec. 118 U. S. C. A. procured issuance of an order for service on defendant outside of district. (Tr. pp. 42 and 43) Order was served upon the defendant E. A. Kelleam and Joe E. Kelleam personally at Sells, Arizona. (Tr. pp. 42-43) Previously a chancery subpoena had been issued and served upon the defendant Nell Southard and J. R. Southard, Jr., at Blanchard, Oklahoma, on July 17, 1938. All these four defendants, after filing special pleas to the venue and jurisdiction of the court and upon such pleas being overruled, moved to strike the cross-petition for want of jurisdiction of the subject matter which was overruled, and the defendants then filed their answer and plea in abatement and answer to the cross petition (these various pleadings appear Tr. pp. 43 to 55).

With the issues thus joined, this cause was tried by the Trial Court in the Northern District of Oklahoma on June 21st, 1939 and for the proceedings had and the testimony developed at the trial on behalf of the Maryland Casualty Company, we refer this Honorable Court to the printed record of this cause (Tr. pp. 86 to and including near the bottom of page 111); and, for the proceedings had and the evidence developed in the trial court by the cross-petitioners we call the court's attention to the printed record in this cause. (Tr. pp. 111-113 inc.)

At the conclusion of the trial on June 21st, 1939, the Trial Court directed the parties to submit brief and took the matter under advisement; and then on August 30th, 1939, made Findings of Fact entered a decree—both of which Findings of Fact and Decree were filed on September 26th, 1939, and are set out—the Findings of Fact and Conclu-

sions of Law (Tr. pp. 67 to 78) and the Decree (Tr. pp. 78 to 82).

The Trial Court found, as shown by his findings of fact and conclusions of law that the estate of Leggette D. Kelleam was not an ancestral estate—that the decree of the county court of Creek County, Oklahoma, was obtained by the petitioners, E. A. Kelleam and Nell Southard, by fraud on their part, and was, therefore, void. That the half-sisters and the half-brothers, and the children of the deceased half-sisters and half-brothers were heirs and entitled to share in the estate of Leggette D. Kelleam.

That E. A. Kelleam and his surety were liable to the defrauded heirs; that the surety company was entitled to exoneration and to have the estate impressed with a trust; and the decree impressed a trust upon the property in favor of the defrauded heirs, for their distributive shares in the estate and in favor of the surety for E. A. Kelleam, and ordered the property in the hands of the Receiver sold to satisfy these liens—unless, an accounting be made and the defrauded heirs given their share of the estate.

From this decree an appeal was prosecuted to the Circuit Court of Appeals by the defendants in that cause, who appear in this case as the petitioners.

The Circuit Court of Appeals affirmed the decree of the Trial Court and rendered its opinion on June 17th, 1940, which opinion is set out in the record. (Tr. pp. 136-145 inclusive)

It is from the judgment and decree of the Circuit Court of Appeals that this cause has been ordered to this Honorable Court by Writ of Certiorari for its review, on specifications of error complained of and under jurisdictional statute invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925. (Chap. 225, 43 Stat. 938, 28 U. S. C. A. 347; and under Para. 5 (b) of Rule 38)

SPECIFICATIONS OF ERROR.

This suit has been brought to this Honorable Court by the petitioners, as we take it from the record, solely on jurisdictional errors contended by the petitioners to have occurred in the proceedings in the lower court.

The petitioners have classified these specifications of error into two main divisions and have further classified this in their argument into five divisions.

The first contention of the petitioners is that the Federal Court could not acquire any jurisdiction in this case for that the matters involved herein were originally in and taken cognizance of by the county court of Creek County, Oklahoma, and that all of the parties were before that court and full relief could be granted by that court and it had exclusive jurisdiction and that therefore this action could not be maintained.

The second contention was that the county court of Creek County having original jurisdiction in the probate case and having exercised this jurisdiction and having adjudicated all of the matters pertinent to the subject matter, in which these parties were interested, the Federal Court could not interfere with the jurisdiction of the State Court in the administration of that estate. Petitioners, therefore, contend that by this action the Federal Court did in fact interfere with the jurisdiction of the county court of Creek County in the due administration of the estate. Therefore, that this constitutes a conflict between the State and Federal Courts.

SUMMARY OF ARGUMENT.

In presenting the argument in this case the petitioners have divided their presentation of the matters controlling, as they claim, into four divisions; and we shall attempt in answering petitioners' argument to follow as closely as feasible and possible the outline of the petitioners in their presentation, although in the outset and at this point we must frankly state we cannot follow petitioners' reasoning or line of argument as it has been presented, since it is in

conflict, as we understand it, with all of the controlling decisions in connection with the matters involved herein.

This respondent, the Maryland Casualty Company, brought a suit in the United States District Court alleging it was a citizen and resident of the state of Maryland, the state in which it was incorporated and which gave rise to its existence, upon the one hand and against all of the Kelleam heirs, both full blood brothers and sisters of the deceased Leggette D. Kelleam and the half-blood brothers and sisters and children of half-blood brothers and sisters now living, who constitute all of the heirs of the said Leggette D. Kelleam, deceased. All of these last named persons lived, resided and had their residences in some state other than the residence and citizenship of the Maryland Casualty Company. This was alleged and then proof to sustain same was made, at the time of trial; so that, in the first instance this became a suit and cause of action between the Maryland Casualty Company upon the one hand—a citizen and resident of Maryland—and citizens upon the other hand who were known non-residents of the state of Maryland, so that we met the first requirement that the action was between citizens of different states.

Then too, the relief sought was to establish a lien upon and a claim to certain property, real and person, a large portion of which had its fixed character in Creek County, Oklahoma, which is in the Northern District of Oklahoma and the balance of the property involved had a fixed character in Oklahoma County, located within the Western District of the United States District Court of Oklahoma, an adjacent district to the northern district.

The fact that the property involved in this action was located both in the Northern District for the United States District Court for the State of Oklahoma and in the Western District of the United States District Court for the State of Oklahoma entitled the plaintiff, if it had a cause of action of a local nature, to bring this suit in either the Northern District of the United States District Court for Oklahoma or the Western District of the United States

District Court for Oklahoma, and that then left only the question of whether or not, under the laws of this jurisdiction, the suit involved here was one of a local nature and one under the fixed law of this jurisdiction the plaintiff was entitled to maintain.

ARGUMENT AND AUTHORITIES.

The petitioners in this cause seem to have a notion that this is a suit on an administrator's bond, and that the right of the Maryland Casualty Company must have been in the bond. That is not the nature of this suit at all.

This is an action brought by the surety on the administrator's bond in the nature of a suit in exoneration and to impress a lien upon the property involved, which had been distributed by the administrator to himself and to his sister from the estate of the deceased brother Leggette D. Kelleam by a series of fraud.

The administrator, E. A. Kelleam, in collusion with his sister Nell Southard had perpetrated an extrinsic fraud on the county court of Creek County, Oklahoma, to obtain at the hands of such county court all of the estate of Leggette D. Kelleam, deceased for themselves and at the expense of all the other heirs, and the surety on the administrator's bond. The half-blood heirs had discovered this deceit and fraud practiced by E. A. Kelleam and his sister, Mrs. Nell Southard, and were seeking to set aside the decree under which all of this property had apparently been given to E. A. Kelleam and Nell Southard.

Under the law of this state, upon the death of a person his property—both real and personal—descends to his heirs, subject only to the right of administration. The law fixes the title and ownership in and to the property and this title and ownership is incumbered only by the debts and obligations to be paid through administration. The decree of the county court does not then within itself, pass any title. It is only evidence of the fact to whom the title descended by operation of law, under the law of descent and distribution in this state.

That the half-blood brothers and sisters and other heirs were entitled to inherit equally with the whole blood brother and sister of the deceased Leggette D. Kelleam, under the law of the State of Oklahoma is not disputed, but is clear. See O. S. A. title 84, Sec. 213.

> "When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it descends and must be distributed in the following manner: * * *
>
> "Third. If there be no issue, nor husband nor wife, nor father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if the deceased, being a minor, leave no issue, the estate must go to the parents equally, if living together, if not living together, to the parent having had the care of said deceased minor."

If the estate of Leggette D. Kelleam was ancestral, coming from the mother of Leggette D. Kelleam, the half-blood heirs were excluded, if it was not ancestral they were entitled to inherit.

In any event, they were entitled to their day in court and if E. A. Kelleam and Nell Southard practiced a fraud upon the County Court of Creek County, Oklahoma, depriving them of their day in court, then the Order of the county court was void. This is clearly the law in the state of Oklahoma and in support of this contention we call the court's attention to the Oklahoma case of *Beatty* v. *Beatty,* 114 Okla. 105, 242 Pac. 766. This case we have quoted from at length in our brief filed in this cause in opposition to petition for writ of certiorari at page 13.

The Oklahoma court is committed to the doctrine that various forms of decrees obtained by fraud avail the persons obtaining them no protection. Upon this question we cite the following cases:

Caulk v. *Lowe,* (Sup. Ct. of Okla) 74 Okla. 191, 178 Pac. 101;
Green's Estate, 80 Okla. 256, 196 Pac. 128;

Dawkins v. *Peoples Bank & Trust Co.*, 117 Okla. 181, 245 Pac. 594;
Forgy v. *Lamphear*, 144 Okla. 245, 291 Pac. 83;
Wheeler v. *Bigheart*, 172 Okla. 262, 43 P. (2) 1077.

All questions raised by the petitioners herein were extensively dealt with by the Circuit Court of Appeals and authorities there cited to sustain the contention of the Circuit Court of Appeals and especially we invite the attention of this learned court to the very able opinion of the Circuit Court of Appeals shown in the record of this cause. (Tr. pp. 136-145)

On page 19 of the petitioners' brief we want to call special attention to the following assertion:

> "The Circuit Court conceded and the trial court found no complete diversity of citizenship between the contending claimants (R. 68-9) insofar as the action was one to impress a trust upon real or personal property there was no complete diversity of citizenship between those seeking this relief."

We believe by an examination of the record that this Honorable Court will be impelled to the conclusion that there is nothing shown to justify the above statement and the argument that follows, down to and including the bottom of page 23 of petitioners' brief.

On page 20 of petitioners' brief, second paragraph thereof, petitioners state:

> "The opinion suggests the property had a fixed situs in the northern district, but the decree was limited to no particular property but fixed a lien upon it all, real, personal and mixed, with no proof of its situs."

With reference to this statement a mere casual examination of all the pleadings in this cause and the property dealt with by the trial court and the Circuit Court of Appeals clearly discloses that the only property dealt with in this action—the only property that was affected by this action, or attempted to be affected, were the two houses and lots in Drumright, Creek County, Oklahoma; Sam Vance

oil and gas lease in Creek County, Oklahoma and the property in Oklahoma County, Oklahoma, and even if the court had attempted to—but it did not—affect any other property, it would not void the action of the court so far as the property within its jurisdiction is concerned, but only the property beyond its jurisdiction. *Carney* v. *Commonwealth O. & G. Co.* (D. C. Kans. 1933) 5 Fed. Sup. 304.

We shall employ the petitioners' titles in the following argument.

"I. Jurisdiction of the County Courts of Oklahoma in Probate Matters is Exclusive Original Jurisdiction."

As to this proposition advanced by the petitioners we make no objection, nor do we quarrel with any of the authorities therein cited. The only answer we have to that proposition is that these cases are not applicable to this cause because there is no attempt here to administer on the estate of Leggette D. Kelleam deceased, or to interfere with the county court of Creek County or its administrator. We concede that the administrator appointed by a county court is an officer of that court—takes possession of the decedent's property in obedience to the order of the court, and that the administrator's possession is the court's possession and cannot be disturbed by any other court. However, it is a well settled rule that a person entitled to a distributive portion of an estate may establish his right to share therein and to enforce this right against the administrator personally, or his surety, or against any other person that may be liable therefor. And this kind of a proceeding does not disturb the possession of the property by the said court. Citing *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, 44, 30 S. Ct. 10, 54 L. Ed. 80; *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613, 619, 56 S. Ct. 600, 80 L. Ed. 920; *Princess Lida of Thurn and Taxis* v. *Thompson*, 305 U. S. 456, 59 S. Ct. 275, 281, 83 L. Ed. 285.

There is no attempt made in this case to interfere with the administrator's possession of this estate. The case has

been closed, the property has been distributed to those claiming to be the heirs; and at the time of instituting this suit, the property stood in their names and this is a proceeding against the persons who wrongfully procured this property.

The Circuit Court of Appeals for the Ninth Circuit has specifically held this kind of an action may be maintained—that the omitted heir can sue the administrator for a distributive share in an estate and that the United States District Court may deprive a party of the benefits of a decree fraudulently obtained in a state court, since same does not operate on the court but on the parties. *Hewitt* v. *Hewitt, et al.*, 17 Fed. (2) 716, and to the same effect is the case of *Marshall* v. *Holmes,* 141 U. S. 589, 12 S. Ct. 62, 35 L. Ed. 870.

"II. That Jurisdiction Was Duly Invoked and Exercised Prior to the Institution of the Instant Proceeding as to Both the Subject Matter and the Parties."

The petitioners take the position that the Maryland Casualty Company had invoked the jurisdiction of the county court prior to instituting this suit and under those provisions of this proof on page 28 single out the following:

> "Q. Mr. Green did appear in the County Court?"
> "A. That is right, he was representing the Maryland Casualty Company." (R. 97)

That is the only place in this part of the brief they undertake to bind this respondent by reason of anything done in the County Court. Upon examining the record you will note that is simply a question and answer elicited by a witness on the trial of this case and does not rise to the dignity of showing that this respondent in any way conceded to or invoked the jurisdiction of the county court. A reading of the record will disclose that when these half-blood heirs filed their protest in the county court, in order that the surety on the administrator's bond would, after the case had been closed, upon reopening, be liable for the acts

of the administrator, the surety would have to be notified of this proceeding.

This is the rule in this state, in the case of *Hartford A. & I. Co.* v. *Goldberg,* 61 P. (2) 704, 178 Ok. 75. Although the record is not clear upon it, this respondent Maryland Casualty Company was appearing in the county court in an effort to quash this notice.

The petitioners make the bold assertion no personal notice is required in administration proceedings and would leave the impression with this Honorable Court that everything that was done in this cause in the original probate proceeding, was regular. In this connection we would like to call the court's attention to the statute of the State of Oklahoma governing the petition for and appointment and qualifications of administrators. O. S. A. title 58, chapter 3, Sec. 127:

"REQUISITE OF PETITION FOR ADMINISTRATOR"

"Petition for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the Judge of the court, stating the facts essential to give the court jurisdiction of the case, and when known to the applicant, he must state the names, ages and residences of the heirs of the decedent, and the value and character of the property. * * *"

O. S. A. title 58, Chapter 3, Section 128:

"NOTICE OF HEARING. When a petition praying for letters of administration is filed, the Judge of the County Court must set a day for hearing the same and cause notice thereof to be given, containing the name of the decedent, the name of the applicant for letters, and the day on which the application will be heard; said notice must be given by posting the same in three public places in the county, one of which shall be at the court house in which said hearing is to be held, and a copy of the same shall be mailed to each of the heirs of the deceased, with the postage thereon prepaid. If the post office address of any of the heirs is

unknown, notice of said hearing shall be given by publishing the same in some newspaper published in said county, at least ten days before the date set for said hearing; * * *"

O. S. A. title 58, Chapter 3, Section 130:

"HEARING OF PETITION—ORDER. On the hearing, it being first proven that notice has been given, as herein required, the Court must hear the allegations and proofs of the parties; and order the issuing of letters of administration to the party best entitled thereto."

O. S. A. title 58, Chapter 3, Sec. 162:

"NON-RESIDENT REPRESENTATIVE MUST APPOINT AGENT: Every administrator, executor, or guardian, appointed in but residing out of the state, shall before entering upon the duties of his trust, in writing, appoint an agent residing in the county where he is appointed, and shall by such writing stipulate and agree that the service of any legal process upon him as such executor, administrator or guardian, if made on said agent shall be of the same legal effect as if made on himself personally within the state. Such writing shall give the proper address of such agent and shall be filed in the office of the Judge of the county court, in which such appointment is made."

Clearly, from the above cited statutes of this state, it is a fixed policy of the law of this state that before administrators shall be appointed of decedents estates, they shall comply with the law and give the court the information of who the heirs at law are; their names and addresses; that notices must be mailed to them personally and that they be given a right to come in and protect their interests. In this particular case, not only the administrator and his sister did not give these notices but they concealed at that time from the court that there were any other heirs. Not only that, but the administrator gave his address as Drumright, Creek County, Oklahoma, and did not make the appointment of a service agent for himself as a non-resident of Oklahoma, thus at least by this omission representing to the court that he was a resident and citizen of Oklahoma.

We concede, as is held in the case of *Johnson* v. *Petty*, 118 Ok. 178, 246 P. 848, and also in the case of *Exendine* v. *Iron*, 4 P. (2) 1035, 153 Ok. 177, that as to valid binding judgments rendered by the county court, there can be no collateral attack.

We likewise contend that this proceeding is not a collateral attack and that a proceeding in equity to set aside a probate decree for fraud for procuring it is a direct as contradistinguished from a collateral attack.

In the case of *Charlotte Weyant et al., Respt.* v. *Utah S. & T. Co.*, Appt. 182 P. 189; 9 A. L. R. 1119, the Supreme Court of Utah in the third syllabus of the case says:

> "A proceeding in equity to set aside a probate decree for fraud in procuring it is a direct as contradistinguished from a collateral attack." (See 15 R. C. L. 729, 873)

And also in the same opinion cited in 9 A. L. R., page 1123, the court says:

> "Probate proceedings and a decree in probate proceedings may be assailed in a direct proceeding in a court of equity of general jurisdiction on the ground of fraud, or other grounds of equitable recognizance for the same reason other decrees and judgments of nisi courts may be assailed in equity."

and cites in support of this statement a long list of cases.

Under this state of facts we, therefore, represent to this Honorable Court that it cannot be justly said that this Respondent, plaintiff in the case below, conceded jurisdiction or invoked the jurisdiction of the county court of Creek County, Oklahoma.

"III. The Judgment of the County Court Refusing to Vacate the Decree Was in Conformity to Local Law."

We concede as to this proposition that so far as the mechanics and procedure followed in the probate court were concerned it followed the local law. We also concede

that under our statutes E. A. Kelleam was entitled to appointment as Administrator. He had preferential right to appointment, but all of the cases cited by petitioners under this subdivision of their brief, contemplate of course that all of the facts were disclosed to the court and that designated heirs under the statute of this state be named to the court and their relation to the estate set out. All of the cases cited by counsel under this subdivision of the brief are cases where an heir had failed to receive his distributive share—but had had his day in court—and then sought to have a court of equity give him that which he had had an opportunity in the probate court to obtain and had simply slept on his rights.

There is a vast difference between the facts in all these cases and the facts in the case at bar. The record in this case clearly discloses that E. A. Kelleam and his sister Nell Southard started out from the very beginning to obtain this entire estate. They did not name and disclose to the county court that there were half-blood heirs at the time of petitioning for letters, and never revealed this information to the court until two of these heirs had come in to contest their right in the county court to this estate. And then they did not simply conceal information from the court but they contracted with these two sets of heirs to pay them $4000.00 conditioned on the fact they were able to get by with the county court on their new theory that this was an ancestoral estate, and that no contest be made before the appeal time would elapse so no appeal could be taken from this Order.

On page 34 of petitioners' brief, the petitioners point out that one of the claimants testified, "My sister heard that the estate had been administered and told me. That was two years ago last October". This statement we know is in the record and of course if the witness were not mistaken, just merely calculating from dates, petitioners' statement that this date was prior to the decree of heirship would be correct, because this witness was testifying

in June 1939 and that statement would place the time as October 1936, which of course would be prior to the decree of heirship. Surely from this whole record and the statement itself it can be and will be ascertained by any reasonable mind that the date was after the decree of heirship because the statements show that her information was that the estate had already been administered. This can serve only one purpose in the world and that is to show that one of these heirs knew of the existence of the probate proceedings in time to have come into the county court. Surely this mere single incident on the part of one claimant if it were true would not defeat the substantial rights of all these litigants.

The petitioners, at the bottom of page 34 of their brief, make this statement,

> "Construction of administration laws of the state by the Supreme Court of the state is binding on the federal courts. Such laws are not merely rules of practice, but laws limiting the rights of the parties."

In support of that statement petitioners cite the case of *Security Trust Co.* v. *Black River Nat'l Bank,* 187 U. S. 211, 23 Supl. Ct. Rep. 52, 47 L. Ed. 147. We have examined this case and the only thing it holds is that the Federal Court is bound by the statute of limitation of the state where the court is sitting.

"IV. It Was the Duty of the Federal Court to Sustain the Plea of the Petitioners to Dismiss the Bill of the Surety for Want of Jurisdiction at the Trial."

This respondent shall answer all of the issues raised by the petitioners under this division of their brief and as to the sub-divisions thereunder (a) (b) (c) (d) under the one heading and shall discuss them all together.

This action was commenced by the Maryland Casualty Company for exoneration by having a lien impressed upon certain property distributed by the administrator to him-

self and to his sister and to impound, keep and hold this property for indemnity against loss; and this action was as said by the Circuit Court of Appeals:

> "An action to impress a trust on real and personal property with a fixed situs in the Northern and Western Districts of Oklahoma."

Section 116, title 28 U. S. C. A. provides that a local action involving property of fixed character lying partly in one district and partly in another may be brought in the district court of either district. Sec. 118, title 28, U. S. C. A. provides for service of summons on absent defendants in suits to enforce liens. (Tr. p. 141) As said by the Circuit Court of Appeals,

> "These are the applicable statutory provisions to an action such as we have here, and not sections 111 and 112, 28 U. S. C. A. upon which the appellants rely."

Our lawsuit must stand or fall on this proposition. That is—that this was an action to impress a trust upon real and personal property located and having a fixed situs in the northern and western districts of Oklahoma. Two things must exist. That is, that our action must be to impress a lien, trust or claim in and to such property located in such districts, or our action must fail. Two things must exist; a right of action in the Maryland Casualty Company at the time the suit was brought and property of a fixed nature located in the northern and western districts of Oklahoma. And unless this is sustained we cannot hope to sustain this action and the judgment of the lower courts, and it is to that purpose we address all of the matters involved in sub-divisions of IV of petitioner's brief.

Nearly all courts of the various states and the federal courts almost universally recognize the right of a surety to protect itself against a loss and an inevitable loss against its principal and have allowed this protection under almost every conceivable remedy known to and recognized by our jurisprudence. Oklahoma especially is committed to this

doctrine. Our State Legislature has enacted this right in statute. Section 88 Oklahoma Statutes 1931. O. S. A. title 12, Sec. 1108, says:

> "SUIT BY SURETY BEFORE LIABILITY DUE. A surety may maintain an action against his principal, to obtain indemnity against the debt or liability for which he is bound, before it is due, whenever any of the grounds exist, upon which, by the provisions of this code, an order may be made for arrest and bail, or for an attachment" (R. L. 1910 Sec. 5308).

O. S. A. title 12, Section 1109 says:

> "In such action the surety may obtain any of the provisional remedies mentioned in Articles 8, 9 and 10 upon the grounds and in the manner therein prescribed."

Oklahoma cases sustaining this right even include the harsh remedy of attachment as follows: *Walton et al.* v. *Williams*, 5 Okla. 642, 49 P. 1022; *Morley Const. Co. et al.* v. *Maryland Casualty Co.*, 8 Cir., 90 F. 2nd 976; *Glades County, Fla.* v. *Detroit Fidelity & Surety Co.*, 5 Cir., 57 F. 2nd 449.

Also as said by the Circuit Court of Appeals in this case (Tr. p. 142):

> "It has also been frequently held that in such an action a receiver may be appointed pending the determination of the issues in the action for exoneration. O. S. A. Title 12, Section. 1551, Sec. 773 Okla. Stat. Sanford v. U. S. Fidelity & Guaranty Co., 116 Ga. 689, 43 S. E. 61; Stulz-Sickles Co. v. Fredburn Const. Corp., 114 N. J. Eq. 475, 169 At. 27; Central Surety & Ins. Corp., et al. v. Bagley, (D. C. Colo.) 44 F. 2nd 808; Southwestern Surety Ins. Co. v. Wells, (D. C. Pa.) 217 F. 294."

So that under the fixed and recognized local law of the State of Oklahoma this surety had a perfect right to proceed against any of the property of E. A. Kelleam that might be found in this state. The surety found property located in two of the federal districts of this state and it elected to and did bring this action in the Northern District of Oklahoma—

one of the districts in which property was located, and under Sec. 116 U. S. C. Ann. Title 28 (Judicial Code Sec. 55), it had a perfect right to do this. Then under U. S. C. Ann. Title 12, Section 118 (Judicial Code Sec. 57) Maryland Casualty Company had a perfect right to issue the warning order and proceed as it did proceed.

So that it is clearly demonstrated that this action was authorized by the local law of the State of Oklahoma and was a civil case cognizable by the federal courts and was concerning property that has a fixed character with its situs in the northern district of Oklahoma and there was, as is shown by this record, a diversity of citizenship shown to exist between the plaintiff in the original action, the Maryland Casualty Company, and all of the other defendants in that action.

Surely it will not be contended that this surety did not have a right, under the facts alleged to exoneration and protection of the courts.

Morley Construction Co. et al. v. *Maryland Casualty Company,* (C. C. A. 8th Cir. 1937) 90 F. (2nd) 976, (syllabus):

> 1. "Quia timet is a name given to a bill in equity filed by a person fearing some future injury to his rights in property, real or person, from the negligence, fault, or fraud of another."
>
> 2. "Where surety on construction bond given in connection with public building contract, seeking to compel application of installments paid on contract to payment of labor and materials going into building, alleged that outstanding bills amounted to more than $100,000, that the final estimate together with balance of funds on hand from prior installments which have been paid did not equal that sum, and that insolvent construction company unless restrained would convert or conceal funds, resulting in irreparable loss to surety, surety was entitled to remedy of exoneration."

Certiorari was denied 302 U. S. 748, 82 L. Ed. 578, 58 S. C. 266, rehearing denied, 302 U. S. 779, 82 L. Ed. 602, 58 S. C. 362.

In that case the relief sought by the surety was to impress a trust or lien upon funds paid its principal, the contractor of a public building, and the federal government had paid the contractor by checks which were deposited in a Kansas City, Mo. bank. The Supreme Court of the United States in the case of *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 81 L. Ed. 593, held that the cause should be remanded to the Court of Appeals to pass upon the question whether relief in the form of exoneration is proper under the circumstances. This was done in 90 F. (2d) 976, and certiorari denied as above indicated.

There are other cases illustrative of a surety's right of exoneration that are strong and well reasoned cases.

Glades County, Fla. v. *Detroit Fidelity & Surety Co.*, (C. C. A. 5th Cir.) 57 F. (2d) 449. This case is quite instructive.

> "As between surety and bankrupt contractor whose trustee refused to pay materialmen, equity of exoneration held to arise without payment by surety and without suit against it."

Receivership is a proper remedy for enforcing the right of exoneration.

Sanford v. *United States Fidelity & Guaranty Co.*, (Ga. Sup. Ct. 1902) 116 Ga. 689, 43 S. E. 61.

Central Surety & Ins. Corporation, et al. v. *Bagley*, (Dist. Ct. S. D. Calif. Cent. Div.) 44 F. (2nd) 208.

There are many other cases where equity has recognized a surety's rights of exoneration and enforced it in many ways. Injunctions have been granted, receivers appointed and equitable garnishments have been granted, and funds traced and applied, as stated in *Glades County, Florida* v. *Detroit Fidelity & Surety Co.*, previously cited, at page 452, of 57 F. (2).

"V. It Was the Duty of the Court to Sustain Motion to Dismiss Both the Bill and the Cross Petition at the Trial for Want of Jurisdiction."

Under this subdivision of the petitioners' brief very much the same contention is made as is made in sub-division IV. The petitioners contend and claim that because there was not shown to be a diversity of citizenship between the petitioners herein and the cross petitioners, to-wit; the full-blood heirs and the half-blood heirs that this defeats jurisdiction of the federal court. Petitioners contend that it was the duty of the trial court to realign the parties according to their interests. Clearly from the entire record in this case it is disclosed that there was no common interest and no common purpose to be served between the Maryland Casualty Co., plaintiff in the lower court and the cross petitioners. The interests of the cross-petitioners was adverse to the interest of the Maryland Casualty Company and there was no common interest between them. The only thing that was ever complained of in the trial court or the Circuit Court of Appeals and seriously urged was the failure to properly allege diversity of citizenship between the plaintiff and all of the defendants. This came about in the only serious argument the petitioners ever advanced that the petition of the plaintiff in the trial court used the word "residence" instead of the word "citizenship." This question was raised in the lower court, and raised in the Circuit Court of Appeals and there briefed and argued on the proposition that the "allegation of residence" was not the equivalent of the "allegation of citizenship." The Trial Court and then the Circuit Court of Appeals dealt with this question and the Trial Court as did the Circuit Court of Appeals passed upon this proposition. It was admitted in the Circuit Court of Appeals that the allegations in the complaint were perhaps defective, but that the entire record and the pleadings showed that the Maryland Casualty Co., was a resident and citizen of Maryland and that all of the other defendants resided and were citizens and residents outside the state of Maryland, and thus created a diversity of citizenship that fixed jurisdiction upon the district court

of the Northern District on the basis of diversity of citizenship. This was held upon the authority of the following cases:

Realty Holding Co. v. *Donaldson,* 268 U. S. 398, 45 S. Ct. 521, 69 L. Ed. 1014;
Wolfe v. *Insurance Co.,* 148 U. S. 389, 13 S. Ct. 602, 37 L. Ed. 493;
Robertson v. *Cease,* 97 U. S. 646, 24 L. Ed. 1057.

The Circuit Court of Appeals further held and it is supported by a number of cases that failure to properly allege diversity of citizenship between the plaintiff and defendants will not, however, defeat the jurisdiction of the federal court, if as a matter of fact, such diversity exists.

Halsted v. *Buster,* 119 U. S. 341, 7 S. Ct. 276, 30 L. Ed. 462;
Continental Ins. Co. v. *Rhoads,* 119 U. S. 237, 7 S. Ct. 193, 30 L. Ed. 380;
Howe v. *Howe & Owen Ball Bearing Co.,* 8 Cir. 154 F. 820;
Fidler v. *Roberts,* 7 Cir. 41 F. 2nd 305.

Then the Circuit Court of Appeals took up the question of the alleged defective averment of diversity of citizenship but held where the court is satisfied in the light of all the testimony, that the averments of residence in a designated state were intended to mean and reasonably construed must be interpreted as meaning that it was a citizen of that state, it sufficient to sustain federal jurisdiction, citing the case of *Sun Printing & Publishing Ass'n* v. *Edward,* 194 U. S. 377, 24 S. Ct. 696, 48 L. Ed. 1027.

The Circuit Court of Appeals further points out that under oath, in the County Court, E. A. Kelleam states that his address was Drumright, Okla.,—Nell Southard was a resident of Blanchard, Okla., and the petitioning defendants herein in their answers (Tr. 50/55) admit the residence and citizenship of the plaintiff Maryland Casualty Company and admit the alleged residence of the petitioning defendants, and all they denied on information and belief was that the

cross-petitioning defendants were residents and citizens of the State of Arkansas and State of Oklahoma and that part of the defendants lived in the State of Oklahoma and within the northern district. The proof disclosed to the satisfaction of the trial court and to the satisfaction of the Circuit Court of Appeals that all defendants lived in and were citizens of states, other than the citizenship of the Maryland Casualty Company.

It is a well settled rule of law that proof of the residence of a person is prima facie evidence that he is a citizen thereof and especially is this true when no issue upon that fact is made by the citizen whose residence and citizenship is under question. *Mahon* v. *Somers, et al.* cc Ohio, 112 F. 174; *Anderson* v. *Watt*, 138 U. S. 694, 11 S. Ct. 449, 34 L. Ed. 1078; *Desmore* v. *U. S.*, 93 U. S. 605, 23 L. Ed. 959.

Maryland Casualty Company had a claim in equity for exoneration and lien upon the property which by this action was sequestered by the receivership to satisfy the requirement of the statute that an equitable lien or claim existed. That the surety has an equitable lien or claim on the property is supported by the following decisions.

Morley Construction Co. et al. v. *Maryland Casualty Co.*, 90 F. (2) 976;
Glades County, Fla., v. *Detroit Fidelity & Surety Co.*, 57 F. (2) 449;
Southwestern Surety Ins. Co. v. *Wells, et al.*, 217 F. 294;
Walton v. *Williams*, 5 Okla. 262, 43 Pac. (2) 1028;
Des Moines Bridge & Iron Works v. *Plane et al.*, 163 Iowa 18, 143 N. W. 866;
Taylor v. *Harris' Admr. et al.*, 164 Ky. 654, 176 S. W. 168;
Republic Nat. Bank & Trust Co. et al., v. *Massachusetts Bonding & Ins. Co.* (C. C. A. 5th Circuit) 68 Fed. (2) 445.

Petitioners seek to avoid the judgment of the trial court by asserting this is an action in personam and not in rem. In this connection it will be clearly noted that the decree

of the trial court makes and attempts to grant no relief or to act in any way except against the res. (Tr. 78-82) No personal judgment was rendered or attempted to be rendered; only a lien created upon the property.

That such a lien or equitable claim was created by the act of the administrator in distributing this property and existed when this action was filed, is clearly supported by the facts in this case and by authority of law. *Porter et al.* v. *Cook*, 63 Fed. (2) 637.

In the case of *Porter Land & Water Co.* v. *Baskin*, 43 Fed. 323, it is held that a statute to establish a trust in real estate may be brought under Sec. 118 U. S. C. A. title 28, even though the action also seeks an accounting. It is contended by the petitioners that it was the duty of the trial court to realign the parties in accordance with their real interest. In this connection we believe it is clearly evident by the record, and as we have heretofore pointed out in this brief, that this was an action between the Maryland Casualty Co., plaintiff below, and all of the other defendants and that there was no necessity for the trial court making any different alignment and the court found no realignment of the parties to be necessary.

In the case of *Republic Nat'l Bank & Trust Co.* v. *Massachusetts Bonding & Trust Co., supra,* the Court so held in a similar case to this in the following language:

> "That some of resident defendants in nonresident surety's action seeking application of retained fund to discharge of claim favored relief prayed, occasioned no realignment of parties to destruction of surety's right to federal jurisdiction.
>
> "Where surety sued as nonresident seeking application of retained fund to discharge obligations and made numerous residents claimants parties defendant, dependent jurisdiction arose to settle disputes, even between citizens of same state and involving amount less than $3000.00 so far as necessary fully to administer fund."

The petitioners contend that this is a transitory action and not a local action. In that contention we believe the petitioners are clearly in error—that this contention cannot be maintained. This is an action to impress a trust on real and personal property with a fixed situs in the northern and western districts of Oklahoma and is local in its nature.

Plaintiff in the trial court could have attained no relief sought by it in any other court except either the northern district or the western district of Oklahoma. A receiver was appointed over property located in this district and this action was local in its nature. In the case of *Primos Chemical Co.* v. *Fulton Steel Co.*, 254 Fed. 455, the Court so held (syllabus 9):

> "A suit for the appointment of receivers to conserve and protect the assets of a corporation is one of a local nature, within Judicial Code, Sec. 54, (Comp. St. 1916 Sec. 1036) and under section 55 (section 1037) cannot be maintained in a district wherein the corporation was not domiciled and had no property of a fixed nature."

Also the case of *Tyler et al.* v. *Stanolind Oil & Gas Co.*, 77 Fed. (2) 802, first syllabus is as follows:

> "As respects jurisdiction of federal district court, suit to remove cloud on title to realty presented an equitable action, and was 'local' in character."

The Courts further hold that in order to maintain a location action same must be brought where the property is located; such as is the holding of the case of *Hills* v. *F. S. Harmon & Co.*, 56 Fed. (2) 662, wherein the court holds (first syllabus):

> "'Local', within statute providing where suits of local nature must be brought, is fixed place or determinate zone identified with given region."

Under these authorities we believe it is clear that this action was of a local nature and not a transitory action.

The Maryland Casualty Company could not have maintained this action and conserved this property and had a trust impressed upon it in any other district except either the northern or western districts of the State of Oklahoma and it had a right to choose in which of these districts it would bring this action.

CONCLUSION.

For the reasons hereinabove set out and under the authorities there cited, this Respondent respectfully submits that this action was one cognizable by the U. S. District Court of the northern district of Oklahoma and that the said district court had jurisdiction of the subject matter and acquired jurisdiction to impress the lien which it did impress and determine the matters which it adjudicated, and that this decree should be sustained and the opinion of the Circuit Court of Appeals for the 10th Circuit should be affirmed and in all things approved.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 349

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM AND JOE R. SOUTHARD, JR. ..... Petitioners,

vs.

MARYLAND CASUALTY COMPANY OF BALTIMORE, BALTIMORE, MARYLAND, A CORPORATION, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, ETC. ..... Respondents

BRIEF OF RESPONDENTS

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INDEX

Subject Index

Brief of Respondents

Statement of Case 2

Argument and Authorities

1. United States District Court has authority to vacate the decree of the County Court because same was obtained by fraud 2

1-a. Cross petitioner, or intervenor may obtain the same relief as they could if they were original petitioners 4

2. The judgment of the County Court declaring the estate of Leggette D. Kelleam to be ancentral is void 7

3. Conclusion 9

TABLE OF CASES

Adams v. Anderson, 53 N. Y. S. 141 8

Beatty v. Beatty, 114 Okla. 5, 242 Pac. 766 3

Caulk v. Lowe, 74 Okla. 191, 178 Pac. 101 3

Central Surety Corporation, et al v. Bagley, (9 Cir.) 44 Fed. (2d) 808 4

Eason v. Highley, 28 S. W. (2d) 1048 8

Forgey v. Lamphear, 144 Okla. 245, 289 Pac. 294 3

Green's Estate, 80 Okla. 256, 196 Pac. 128 9

Henderson v. Sherman, 47 Mich. 267, 11 N. W. 153 8

Hewitt v. Hewitt, (9 Cir.) 17 Fed. (2nd) 716 3

Kelley v. McGuire, 15 Ark. 555 8

Long's Estate, 180 Okla. 28, 67 P. (2d) 41, 110 A. L. R. 1002 8

Marshall v. Holmes, 141 U. S. 589, 12 S. Ct. 62, 35 L. Ed. 870 3

TABLE OF CASES (Continued)

New York Security, etc., Company, 94 N. Y. S. 93 8

Republic National Bank & Trust Company v. Massachusetts Bonding Company (5 Cir.), 68 F. (2d) 445 4

Sims' Estate, 162 Okla. 35, 18 P. (2d) 1077 9

Thompson v. Smith, 102 Okla. 150, 227 Pac. 77, 29 L. R. A. 541 8

Wheeler v. Bigheart, 172 Okla. 262, 43 (P.-2) 1028 3

Yahala's Estate, 142 Okla. 79, 285 Pac. 946 8

Zweigel v. Lewis, 139 Okla. 171, 281 Pac. 787 8

STATUTES

O. S. 1931, Sec. 1400-58, O. S. A. 724 2

O. S. A. 1931, Section 1626 7

O. S. A. 128, Section 58 3

80 O. S. A. 222 8

18 C. J. 819, Sec. 21 8

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MARYLAND CASUALTY COMPANY OF BALTIMORE, BALTIMORE, MARYLAND, A CORPORATION, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, ET AL ..... Respondents

BRIEF OF RESPONDENTS

Mrs. Ethel Riddler, Mrs. Dorothy Payne, J. K. Perkins, Mrs. F. Bates, Glen Perkins, Bessie Mathews, Mrs. Elouise Kulp, Leggette Hall, Lamar Hall, Marguerite Bradley Kelleam, Mary Kate Hall, Kelleam Hall, Clifford Kelleam, Kathleen Kelleam, Dr. Fannin Kelleam, Francis Kelleam, Mrs. Jimmie Kelleam and Robert Kelleam.

This brief is filed in behalf of the above named respondents, who were defendants, and cross-petitioners in the trial court. And for convenience they will be referred to as cross-petitioners in this brief.

This brief will be confined to the questions of law which govern the right of the cross-petitioners to the relief sought and granted, on their cross-petition, and affirmed by the Circuit Court of Appeals.

STATEMENT OF CASE

The cross-petitioners adopt the statement of facts contained in the brief of the Respondent, Maryland Casualty Company, and the facts as set forth by the Circuit Court of Appeals in the opinion rendered herein. (Tr. 136).

1. UNITED STATES DISTRICT COURT HAD AUTHORITY TO VACATE THE DECREE OF THE COUNTY COURT BECAUSE THE SAME WAS OBTAINED BY FRAUD.

The petitioners contend that the jurisdiction of the County Court of the State of Oklahoma in probate matters is an exclusive and original jurisdiction, the cross-petitioners find no fault with this statement of the law. The relief sought by the cross-petitioners in this case was from a decree fraudulently obtained in the state court and which showed on its face that it was both fraudulent and void. More than 30 days had elapsed before this decree was known of by the cross-petitioners or attacked in any court by them, and no appeal could be taken from such an order after that period—O. S., 1931, Section 1400-58 O. S. A. 724 reads as follows:

> "An appeal by a party, or by a person interested who was present at the hearing, must be taken within ten days, and an appeal by a person interested, who was not a party and not present at the hearing, within thirty days from the date of the judgment, decree or order appealed from."

The petitioners, herein, had already received the entire estate. There was no attempt by the cross-petitioners to have the Federal Court to take control of any property in the hands of the County Court or to interfere with its jurisdiction in the probate matter. A petition was filed to reopen the case in the County Court and the same judge rendering the fraudulent decree, sustained a demurrer to the petitioners petition to reopen the case and denied its jurisdiction to grant the relief sought, (Tr. 92). An appeal was taken to the District Court of Creek

County from this order. This appeal is now pending in the District Court and while the action of the District Court is not a part of the record in this case in view of the statements made by the petitioners in their brief, the cross-petitioners state that an order was made staying all proceedings in the State Court in that case, a certified copy will be furnished this Court, if desired, at the time of argument.

It is the accepted rule in both the State and Federal Court that a decree of a county court obtained by fraud, as shown in this case, may be attacked collaterally in either State or Federal Court.

Wheeler v Bigheart, 172 Okla., 262, 43 (P 2) 1028.

Caulk v Lowe, 74 Okla. 191, 178 Pac. 101;

Forgey v Lamphear, 144 Okla. 245, 289 Pac. 294.

Beatty v Beatty, 114 Okla. 5, 242 Pac. 766;

Hewitt v Hewitt, (9 Cir.) 17 Fed. (2nd) 716;

Marshall v Holmes, 141 U. S. 589 12 S. Ct. 62, 35 L. Ed 870.

Section 58, O. S. A. 128, reads as follows:

"The name of the applicant for letters, and the day on which the application will be heard; said notice must be given by posting the same in three public places in the county, one of which shall be at the courthouse in which said hearing is to be held; and a copy of same shall be mailed to each of the heirs of the deceased with the postage thereon prepaid. If the postoffice address of any of the heirs is unknown, notice of said hearing shall be given by publishing the same in some newspaper published in said county at least ten days before the day set for said hearing."

The original petition for letters of administration affirmatively shows that E. A. Kelleam and Nell Southard claimed to be the only heirs of the deceased Leggette D. Kelleam, (Tr. 21.) And the above statute was not complied with, no complaint is made by the cross-peti-

tioners of the appointment of E. A. Kelleam as administrator, although he was a non-resident of the State of Oklahoma, and did not so state in his petition for letters testamentary, nor did he comply with section 1017, O. S. 1931, relative to the appointment of a non-resident service agent. The entire record affirmatively discloses that the administrator did not at any time comply with the Oklahoma statutes relative to giving the other heirs notice of the pendency of the probate case in Creek County, Oklahoma, but in truth and in fact attempted to prevent them from finding it out and, when two of the heirs came in to claim their distributive share of the estate, the petitioners, E. A. Kelleam and Nell Southard, entered into a written agreement with them to the effect that they should receive $4,000.00 if the so-called determination heirship and decree of distribution was allowed to become final, (Tr. 29). The statutes and cases above cited could lead to but one conclusion: Fraud as found by the trial court.

The only difference in the cases cited, supra, and this case is that the relief sought and granted to the defrauded parties was by an original petition and in this case it was upon a cross-petition.

A CROSS-PETITIONER OR AN INTERVENOR MAY OBTAIN THE SAME RELIEF AS THEY COULD IF THEY WERE ORIGINAL PETITIONERS

Republic National Bank and Trust Company v Massachusetts Bonding Company, (5 Cir.), 68 F. (2d) 445.

Central Surety Corporation et al v Bagley, (9 Cir.) 44 Fed. (2d) 808.

The case of *Republic National Bank and Trust Company v. Massachusetts Bonding and Insurance Company,* supra, settles the point definitely that the Maryland Casualty Company had the right to file this bill under its own peculiar rights as surety to seek protection of the Federal District Court and the case further gives the right to the cross-petitioners, who were made defendants by

the Plaintiff, Maryland Casualty Company, to have their rights adjudicated in and to any funds or property over which the court acquired jurisdiction by reason of the original action.

The petitioners in their brief suggest to the court that the District Court should have realigned the parties according to their actual sides in the dispute. In the case of *Republic National Bank and Trust Company v Massachusetts Bonding and Insurance Company,* supra, this same contention was made. In this case, the contractor gave a bond to the Republic National Bank and Trust Company to finance him on a certain job with loans made against an assignment of all monies due and to become due on the job. The final payment of $29,000.00 was authorized by the city and the bank representative went with the contractor to arrange collection of it. Three claimants for material and machinery notified the city of their claim and asserted liens amounting to over $5,000.00. The bank and the contractor got from the city a check in the sum of $23,000.00, which the contractor endorsed and the bank applied to a note of that amount held against the contractor. There were numerous other claims and the contractor not having money to pay these claims, placed his affairs in receivership in the state court. The bonding company filed a bill setting up these facts making the parties defendant, the contractor, the city, the bank, who were citizens of Texas and numerous claimants, many of them citizens of Texas, and all of the citizenship other than that of Massachusetts. The contention was made in that case that many of these citizens of Texas are interested with the sureties as against the city and the bank ought to be aligned accordingly, especially since by their answer they had joined in the prayer for the restoration from the bank the $23,000.00. If thus aligned, there would be citizens of Texas on both sides of the controversy. The court in its opinion stated:

> "The basis of the surety's case is an equity of exoneration, an assertion that there are funds of its principal properly applicable to the claims against the bond that ought in equity to be so applied before

he is called on to pay. We examined and upheld this right of the surety on a construction bond under circumstances much like the present in Glades County v. Detroit Fidelity & Surety Company, 57 Federal (2d) 449. The bill is thus based on the surety's own peculiar rights and seeks its protection as surety. If some of the defendants favor the relief prayed, it occasions no realignment of parties to the destruction of the surety's right to federal jurisdiction. By the main bill it acquired jurisdiction over the retained payment and the surety's liability on the bond as a fund for distribution and could deal fully with those subjects."

Attack was also made on the jurisdiction to entertain the so-called cross bills against the city and the bank filed by claimants who were citizens of Texas, wherein they sought money judgments against the city and the bank for the amount of their claims. These judgments a federal court could not grant. By the main bill it acquired jurisdiction over the retained payment and the surety's liability on the bond as a fund for distribution, and could deal fully with those subjects. A dependent jurisdiction arose to settle disputes even between citizens of the same state and involving amounts less than $3,000.00, so far as necessary fully to administer that fund. But dependent jurisdiction exists only because and so far as it is necessary to fully exercise the main jurisdiction.

In this case the defendants and cross-petitioners have not sought to have any personal judgment against the petitioners, but only relief which they prayed for was for the court to distribute the funds, or property, which the Maryland Casualty Company asked the District Court to take charge of in order to protect them on their bond.

The case of *Central Surety Company v Bagley*, supra, holds in addition to granting relief to cross-petitioners similiarly situated to the cross-petitioners herein, held that the Federal Court having once acquired jurisdiction

could adjudicate all matters and claims even though there was pending litigation in the state courts about the same subject matter. We quote syllabus 4 of that case:

> "Federal Court, in surety's suit to marshall assets, having taken possession of the res, may determine controversies regarding disputed claims and liens pertaining to the property seized, notwithstanding pendency of suits in state court." (Jud. Code 265 28 USCA 379.)

2. THE JUDGMENT OF THE COUNTY COURT DECLARING THE ESTATE OF LEGGETTE D. KELLEAM TO BE ANCESTRAL IS VOID.

Under the Oklahoma Law kindred of half blood inherit equally with those of whole blood and in the same degree, unless the property is ancestral, this rule is set out in Section 1626 of the Oklahoma Statutes of 1931, which reads as follows:

> "Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise, or gift or some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from the inheritance."

The record of this case discloses upon examination that none of the property constituting in the estate of Leggette D. Kelleam was in fact ancestral, it consisting of both real and personal property. The inventory (Tr. 25) discloses that the estate consisted of two houses and lots purchased from the Tulsa Building and Loan Association by the deceased and dated August 8, 1933 (Tr. 112), that the Sam Vance lease was acquired in 1930 (Tr. 107), that one Drumright property was acquired on October 29, 1932, and the other October 21, 1935. The record disclosed that Mary A. Kelleam, the mother of Leggette D. Kelleam, died December 4, 1928, her property consisting of 6 lots in Blanchard, Oklahoma, she being the ancestor through whom the estate was alleged to be ancestral, and being dead many years prior to the ac-

quisition of any of the real estate of the deceased Leggette D. Kelleam. There can be no ancestral estate in real property acquired after the death of an ancestor.

In re *Long's Estate,* 180 Okla. 28, 67 P. (2d) 41, 110 A. L. R. 1002.

Zweigel v Lewis, 139 Okla. 171, 281 Pac. 787;

Thompson v Smith, 102 Okla. 150, 227 Pac. 77, 29 L. R. A. 541;

In re *Yahala's Estate,* 142 Okla. 79, 285 Pac. 946;

80 O. S. A. 222;

18 C. J. 819, sec. 21;

Eason v Highley, 28 S. W. (2d) 1048;

Kelly v McGuire, 15 Ark. 555;

There can be no ancestral estate in personal property.

80 O. S. A. 222;

18 C. J. 819, Sec. 21;

Eason v Highley, 28 S. W. (2d) 1048;

Kelly v McGuire, 15 Ark. 555;

Henderson v Sherman, 47 Mich. 267, 11 N. W. 153;

Adams v Anderson, 53 N. Y. S. 141.

The reason for this rule is set out in the case of Matter of New York Security, etc. Company, 94 N. Y. S. 93, herein the court said:

> "It is the policy of the law to avoid such a construction of a statute as will lead to promote litigation. Were it held that the source from which personal property came controlled in any way its distribution, untold litigation and uncertainty would result by reason of the difficulty in tracing and identifying personal property."

The decree of distribution and determination of heir-

ship by the County Judge of Creek County was in plain contravention of the Statutes of the State of Oklahoma and therefore, void.

In re *Sims' Estate,* 162 Okla. 35., 18 P (2d) 1077;

In re *Green's Estate,* 80 Okla. 256, 196 Pac. 128.

In the case of In re Sims' Estate, supra, the court held that where one died the estate and his widow elected to take under the law rather than the will, a decree of distribution in contravention of the statute of the State of Oklahoma awarding here a greater amount than she would take under the statute is absolutely void. And it is the contention of the cross-petitioners that the decree of distribution and determination of heirship in this case being in plain contravention of the statute, comes clearly within the doctrine announced in this case.

CONCLUSION

The petitioners herein do not claim that the cross-petitioners were not the legal heirs of Leggette D. Kelleam, deceased, and entitled to their distributive shares in his estate and it is not contended in their brief that the estate was in fact ancestral. The petitioners E. A. Kelleam and Nell Southard admit they obtained the entire estate of Leggette D. Kelleam both their own shares, and those of the cross-petitioners, herein, the attitude assumed by these petitioners now is having obtained the property in the decree of distribution this court should and has not the legal right to require them to make restitution. The trial court found this decree to be both void and fraudulent, the circuit court in affirming the opinion said:

"The only conclusion which can be reached from an examination of the transcript is that E. A. Kelleam was a faithless trustee, that he designedly and intentionally proceeded from the beginning to conceal the status of the estate from the court and the heirs; and that he and his sister conspired together

to defraud the remaining heirs of that which
their just due. The conclusion of the trial cour
the only one that can be reached."

We respectfully submit that the decisions of the t
court and the Circuit Court of Appeals should be
firmed.

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SUPREME COURT OF THE UNITED STATES.

No. 349.—October Term, 1940.

E. A. Kelleam, Nell Southard, Joe E. Kelleam and Joe R. Southard, Jr., Petitioners, vs. Maryland Casualty Company of Baltimore, Md., et al. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[February 17, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

This controversy has its origin in a probate proceeding in an Oklahoma court. Petitioner, E. A. Kelleam, was administrator in that proceeding. Respondent, Maryland Casualty Company, was surety on his bond. The probate court held that all of decedent's property was a maternal ancestral estate to which the full-blood heirs, E. A. Kelleam and Nell Southard, were entitled to the exclusion of the half-blood heirs, the individual respondents here. Such distribution was ordered and the administrator and Maryland Casualty Company were discharged from further liability. No appeal was taken; but shortly thereafter the half-blood heirs brought an action in the Oklahoma court to set aside that decree, alleging that petitioners E. A. Kelleam and Nell Southard had perpetrated a fraud upon the probate court and that the half-bloods were entitled to participation, the estate being a general not an ancestral estate. A demurrer to the complaint was sustained and an appeal was taken to the Oklahoma District Court where it is now pending. After that suit had been commenced[1] respondent-surety, learning that E. A. Kelleam and Nell Southard had transferred some of the property received from the estate,[2] brought this suit in the United States District Court, joining the full-bloods and the half-bloods as defendants and invoking federal jurisdiction on the basis of diversity of citizenship. In this suit in equity[3] respondent-surety

[1] Respondent-surety apparently was served with notice of that suit and appeared therein for the purpose of quashing the notice.

[2] According to the findings below, transfers were made to petitioners Joe E. Kelleam and Joe R. Southard, Jr.

[3] This was not a bill of interpleader under 49 Stat. 1096, 28 U. S. C. §41(26) nor a suit under the Federal Declaratory Judgment Act, 48 Stat. 955, 49 Stat. 1027; 28 U. S. C. § 400.

sought exoneration on its bond, alleged that its remedy at law was inadequate, and prayed that a receiver be appointed to preserve the decedent's property pending the outcome of the dispute between the heirs, and that the parties be required to set up whatever claims they might have to the property. By their answer and cross-petition, the half-bloods renewed their claims of fraud in the probate decree and joined in the prayer for the appointment of a receiver. The answers of petitioners alleged, *inter alia*, lack of jurisdiction in the federal court by reason of the action in the state court; and they moved to strike the cross-petition for lack of jurisdiction. By an amendment to its bill respondent-surety added allegations charging fraud in the probate decree. The District Court found that petitioners E. A. Kelleam and Nell Southard, knowing of the existence of the other heirs, fraudulently concealed those facts from the probate court, gave no notice to the other heirs as required by law, and represented that E. A. Kelleam was a resident of Oklahoma when he was not; that the administrator failed to appoint a service agent as required by Oklahoma statutes; that the estate was fraudulently represented as an ancestral estate and that petitioners E. A. Kelleam and Nell Southard in furtherance of the plan to defraud the half-bloods consummated a settlement with some of them in exchange for their agreement not to contest the probate decree; that that decree, having been obtained by fraud, was void as to the half-bloods; that the intermediate conveyances by petitioners E. A. Kelleam and Nell Southard were fraudulent; that the remaining assets of the estate were in danger of being dissipated; that respondent-surety would become liable to the half-bloods for failure of the administrator to perform his duties; and that the property should be preserved pending a final order of accounting. Accordingly, it appointed a receiver, decreed that respondent-surety was entitled to exoneration by having designated property applied to the satisfaction of the interests of the half-bloods, decreed that the half-bloods were owners of designated undivided interests in the estate, established a lien thereon, and ordered petitioners E. A. Kelleam and Nell Southard to account. The Circuit Court of Appeals affirmed. 112 F. (2d) 940. We granted certiorari because of the challenged propriety of the action of the District Court in appointing a receiver and in adjudicating matters at issue in the state court.

We think the bill should have been dismissed.

The essential purpose of the bill was to secure the appointment of a receiver so as to conserve the property and to impress it with a lien for the surety's protection. The surety had no stake in the outcome of the dispute among the heirs beyond its contingent right to exoneration. In this posture of the case it is manifest that respondent-surety sought the receivership not as a means to an end but as an end in itself. The receivership was ancillary only in the sense that it was protective of the surety whatever the future outcome of the controversy between the heirs. The surety was not presently liable on its bond; its liability and its right to exoneration were wholly contingent, being dependent on a successful attack on the probate decree by the half-bloods. That attack was currently being made in the state court.

Accordingly, a receiver should not have been appointed. The error in the appointment was not a question of authority but of propriety. *Pennsylvania* v. *Williams,* 294 U. S. 176; *Gordon* v. *Washington,* 295 U. S. 30. As this Court stated in the *Gordon* case (p. 37): "A receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in itself." Receiverships for conservation of property "are to be watched with jealous eyes lest their function be perverted." *Michigan* v. *Michigan Trust Co.,* 286 U. S. 334, 345. This Court has frequently admonished that a federal court of equity should not appoint a receiver where the appointment is not a remedy auxiliary to some primary relief which is sought and which equity may appropriately grant. *Booth* v. *Clark,* 17 How. 322, 331; *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491; *Gordon* v. *Washington, supra.* And the reasons for such restraint are reinforced where the rights to the property sought to be conserved by a receivership are being litigated in a state court. Cf. *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189; *Pennsylvania* v. *Williams, supra.* There was here no accrued right of the surety as respects the enforcement of which the receivership was an ancillary remedy, its right to exoneration being wholly contingent.[4] The existence of any right to exoneration was dependent on the outcome of the action which was pending in the Oklahoma court.

[4] Cf. Glades Co., Fla. *v.* Detroit Fidelity & Surety Co., 57 F. (2d) 449, 453; Morley Const. Co. *v.* Maryland Casualty Co., 90 F. (2d) 976; Southwestern Surety Ins. Co. *v.* Wells, 217 Fed. 294; Central Surety & Ins. Corp. *v.* Bagley, 44 F. (2d) 808; Arant, Suretyship (1931) pp. 318-321.

In view of those circumstances, equity practice does not sanction the use of a conservation receivership to protect such a claim. Furthermore, from all that appears, the surety could be adequately protected in the cause pending in the Oklahoma court by provisional remedies or otherwise.

Respondent-surety contends that under Oklahoma statutes a surety may obtain indemnity against his principal even before the debt is due and receive the protection of various provisional remedies. Even so, a "remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute." *Pusey & Jones Co.* v. *Hanssen, supra,* p. 497.

For these reasons, the appointment of the receiver was an abuse of discretion.

Since respondent-surety had no present claim to relief on its own behalf in the federal court, that court had no jurisdiction to adjudicate the dispute between the full-bloods and the half-bloods. Even if, on this record, the presence of respondent-surety would support a claim to diversity of citizenship, that diversity was lacking as between the other parties. Hence once the bill of complaint were dismissed, no jurisdiction would remain for any grant of relief under the cross-petition. See *Kromer* v. *Everett Imp. Co.,* 110 Fed. 22. And even if the bill be construed as drawing in issue the merits of the controversy between the heirs which the federal court had jurisdiction to adjudicate within the rule of *Arrowsmith* v. *Gleason,* 129 U. S. 86, and *Sutton* v. *English,* 246 U. S. 199, 205, that court could not with propriety proceed. A case involving that very controversy was pending in the Oklahoma court. That case did not involve simply an *in personam* action. Cf. *Kline* v. *Burke Construction Co.,* 260 U. S. 226. It involved an adjudication of rights to specific property distributed pursuant to a probate decree. Cf. *Penn General Casualty Co.* v. *Pennsylvania, supra,* at p. 195. The federal court therefore should not have asserted its authority. In such a case it is "in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Pennsylvania* v. *Williams, supra,* p. 185.

Reversed.